Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-62

RUSSELL L. RUNYON
AND
KATHERYNE E. RUNYON
Petitioners

v.

MICHAEL L. McCRARY, ETC.
AND
COLIN GONZALES, ETC.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement of Facts	3
Reasons for Granting the Writ	5
Legal Argument	6
Conclusion	13
Appendix	1a

TABLE OF CITATIONS

Cases:

Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed. (2d) 45 (1951)	10
Civil Rights Cases, 3 S.Ct. 18, 109 U.S. 3 (1883)	7
Corrigan v. Buckley, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969	9
Hampton v. Thompson (C.A. Tex. 1949), 171 F.(2d) 535	12
Hurd v. Hodge, 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187	9
Jones v. Alfred Mayer & Co., 392 U.S. 409, 88 S.Ct. 2186 (1968)	8
Martinsen v. Mullaney, 85 F. Supp. 76, 12 Alaska, 455 (1949)	7
McDonald v Shawnee Country Club Inc., 438 F.(2d) (632)	9

	Page
Moose Lodge v. Irvis, 407 U.S. 173, 92 S.Ct. 1965 (1972)	9, 10
Norwood v. Harrison, 93 S.Ct. 2804 (1973)	10
Pierce v. Society of Sisters, et al., 268 U.S. 510, 45 S.Ct. 571 (1925)	9
Riley v. Adirondack School for Girls, 368 F. Supp. 392 (1972)	10
Robeson v. Finelli, D.C.N.Y. 1950, 94 F. Supp. 62	12
Shelly v. Kramer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed 1161 (1948)	10
Sims v. Order of Commercial Travelers, 433 F. Supp. 102 (D. Mass. 1972)	9
Tillman v. Wheaton Haven Recreation Association, 410 U.S. 431	10
U.S. v. Cruickshank, 25 Fed. Case No. 14,897, *Affirmed*, 92 U.S. 542, 2 Otto 542, 25 L.Ed. 588	7
Va. v. Rives, 100 U.S. 313	7
Waters v. Pachen Contractors Inc. (D.C., Ill., 1966, 227 F. Supp. 659)	7
Wesley v. City of Savannah, 294 F. Supp. 698	9
Wisconsin v. Yoder, 92 S.Ct. 1526 (1972)	10

MISCELLANEOUS:

42 U.S.C.A. § 1981	2, 6, 7, 8, 11, 13
Cong. Globe, 39th Cong., 1st Sess. 409 (1866)	6
Gressman, CIVIL RIGHTS LEGISLATION, at p. 1329	7

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Petitioner prays for a writ of Certiorari to issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming a judgment of the United States District Court for the Eastern District of Virginia.

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit affirmed, in a 4 to 3 decision, the judgment of the United States District Court for the Eastern District of Virginia, on April 15, 1975. Rehearing by Plaintiff Appellant, and by intervenor denied May 29, 1975.

JURISDICTION

Jurisdiction is invoked under Title 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether Or Not 42 U.S.C.A. §1981 Reaches Purely Private Conduct, and Can Private Schools Free of Any State Action, Set Their Own Standards as to Who They Will Admit.
2. The Unconstitutional Application and Interpretation of 42 U.S.C.A. §1981, By the Lower Court, Whereby it Limits its Application to Only White Schools.
3. The First Amendment of the United States Constitution Guarantees and Protects the Right to a Free Choice of Association, Privacy, and Expression to All its Citizens.

STATUTE INVOLVED

42 U.S.C.A. §1981: (Appendix Exhibit A)

> "All persons within the jurisdiction of the United States shall have the same right in every state and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind and to no other."

STATEMENT OF FACTS

The following is a succinct review of the material facts involved:

A joint action for damages was brought against Petitioners Russell L. Runyon and Katheryne E. Runyon d/b/a Bobbe's School, by Michael McCrary, an infant, by his parents, and Colin M. Gonzales, an infant, by his parents, pursuant to 42 U.S.C. §1981 and 42 U.S.C. §2000a, to secure for the plaintiffs, now respondents, who are black, the alleged right to contract, as enjoyed by whites, and to enjoyment of places of public accommodation without discrimination, based on race or color.

The respondents, at the trial level, waived and dismissed any claims under any civil rights act except 42 U.S.C. §1981. They further stipulated that the petitioners were a private school, not supported by any local, state or federal assistance, thus no state involvement, and relying solely on funds derived from tuition paid by its students to support it. (see p. 181 J.T.)

A similar suit was filed against Fairfax-Brewster School, Inc., which was consolidated for trial.

The Southern Independent School Association intervened, by agreement and with court permission.

The Respondent and Petitioners, Bobbe's School, introduced evidence in their behalf. Regarding Bobbe's School, the Gonzales testimony, in substance was that upon their son being rejected by Brewster School after application, called the Bobbe's School inquired about its integration policy, and upon being told by someone that the school was not integrated, did nothing further. [This was in 1969, suit brought in

1972.] Mr. Gonzales further testified that he was advised of the admission policies of the school, that an application would have to be filled out, a registration fee paid, a need for a doctor's certificate and a personal interview. Also that the "race" of an applicant was not requested on any of the forms. ((See p. 107 of J.T.) Mr. Gonzales never complied in any way, although he admitted receiving the forms. (p. 109 J.T.)) He further testified he did not identify himself nor did he say he was black. (pp. 123-124 Tr.) He said he was only concerned with Brewster School, he never told young Colin about Bobbe's School, or about the call to the Bobbe's School. (pp. 103, 108 J.T.) That the youngster enrolled at Congressional, a private school, lost no time from school, then entered Catholic school, and later a public school. He conceded his son was well adjusted and did well in school. (Mrs. Gonzales's testimony was substantially the same.) see pp. 82-83 J.T.

Mrs. McCrary testified, in material substance, that in 1972 she called the Bobbe's School, inquired about its admission and integration policy and on being told, allegedly, that the school did not accept "blacks", did nothing further. Although advised about the requirement for formal application, did not make any formal application. That she had only the one contact, by phone, with the school. Never told her son about this. (pp. 126, 127 J.T.) Her husband's testimony was essentially the same, but he did not call the school at any time, and he never said anything to his son, about the call and the conversation.

Mr. Gates testified that he was superintendent of Bobbe's School, that it was a development for preschool education, and for the first and second grades.

That he was superintendent in 1969. That he could not recall any calls from Mr. Gonzales, that the school policy did not exclude children purely on basis of race. [(pp. 183-184 J.T. Tr.)] Did not recall any call from McCrary. That the school was integrated, that children of other races attended. That no black child had ever applied. That the school policy was to require formal application for everyone, regardless of race. That any child, regardless of race, would be treatd alike, considered on the same basis. That the school was selective of its students, regardless of race (pp. 185-187 J.T.) That the school policy was that no one was accepted on the basis of any phone call, regardless of race. (p. 187 J.T.)

It was stipulated that Mrs. Runyon, the founder of the school, would corroborate Mr. Gates' testimony. (pp. 188-189 J.T.)

The district court, at the conclusion of the evidence and argument by counsel, rendered a memorandum opinion and judgment order, a copy of which is attached hereto as Exhibit B.

On appeal the judgment was affirmed in part by a divided court, with a 4-3 split as to the main issue of the case. A copy of said opinion is attached here as Exhibit C. The constitutionality of an act of congress is being questioned, therefore 28 U.S.C. §2403 may be applicable.

REASONS FOR GRANTING THE WRIT

1. The issues involve substantial constitutional issues of extreme public importance. They deal with the private rights of citizens guaranteed to them by the Constitution.

2. The issue involved is one of first impression, by any federal court, at any level, involving the constitutionality of 42 U.S.C.A. §1981, and its applicability to purely private conduct.

3. The constitutionally protected right, under the First Amendment, guaranteeing to all citizens the right of privacy, freedom of speech, and association, protects parents and private schools in their private conduct.

LEGAL ARGUMENT

42 U.S.C.A. § 1981 Is Not Applicable To Private Acts of Discrimination

The determination by the trial court and by the majority, 4-3 of the court of appeals, that §1981 reached purely private conduct is clearly erroneous and constitutionally unsound.

It would seem proper, at this time, to briefly summarize the history and background of §1981. This section was conceived during the Reconstruction Era by legislation involving the Civil Rights Act of 1866 and 1870 as well as the 13th, 14th, and 15th Amendments.

The 13th Amendment was passed abolishing slavery and involuntary servitude. Thereafter the Civil Rights Acts of 1866 were passed. The clear and only purpose of the 13th Amendment was to abolish all forms of involuntary servitude. This is confirmed by the Congressional Record of the debates, alluding to the fact that the 13th Amendment was to be no wider than to cover the relation existing between master and slave and could extend no further (Cong. Globe, 39th Cong., 1st Sess. 409 [1866].) The Civil Rights Act of 1866 became law despite a presidential veto. The 14th Amendment came into being because of the great con-

cern about the vitality and legality of the 13th Amendment and the Civil Rights Act. As a matter of fact the provisions of the 1866 Act were meant to be incorporated into the 14th Amendment. (Gressman, Civil Rights Legislation, at p. 1329.) Thus the equal rights amendment was born and given shape in the form of the 14th Amendment. To further reinforce the argument as to the concern over the 13th Amendment and the Civil Rights Act of 1866, the Civil Rights Act of 1870 was passed, re-enacting the Civil Rights measure, after passage of the 14th Amendment, to provide constitutional support.

That the 14th Amendment did not and could not reach private discriminatory acts was clearly decided by this honorable court, in its decision in the Civil Rights cases (109 U.S. 3[1883]). The Honorable Justice Bradley *concluded that individual invasion of individual rights is not constitutionally prohibited and was not, and could not be the subject matter of the Amendment* (id at p. 11). The object of this section (42 U.S.C.A. §1981) was to protect civil rights against state infringement, having reference to the 14th Amendment as its bedrock (see *Va.* v. *Rives,* 100 U.S. 313). And this subchapter could not be given any broader scope than the 14th Amendment on which it was based. (*Martinsen* v. *Mullaney,* 85 F.Supp. 76, 12 Alaska 455 [1949].) The Civil Rights Act of 1866 was passed to shield Negroes from hostile legislation by the states. (*U.S.* v. *Cruickshank,* 25 Fed. Case No. 14,897, *aff'd.* 92 U.S. 542, 2 Otto 542, 25 L.Ed. 588.) And 42 U.S.C.A. §1981, the modern version of the Civil Rights Act, equally only applies to acts done under color of state law. (*Waters* v. *Pachen Contractors Inc.* [D.C. Ill., 1966, 227 F.Supp. 659].)

In passing the Civil Rights Act of 1964 (that is 42 U.S.C.A. §1981) certainly Congress was aware of the Civil Rights Acts of 1866 and 1870, and also of the decisions in the Civil Rights cases decided in 1883, and the interpretations contained in the opinion of the court. It was clear that the U.S. Supreme Court determined that private conduct, that is private acts of discrimination, were not prohibited by the Constitution, and therefore the Civil Rights Acts were not applicable to private conduct.

Certainly, with this knowledge, had Congress intended that 42 U.S.C.A. §1981 reach private conduct, it would have said so. However, it did not and could not intend to restrict purely private acts (albeit admission policies to private or independent schools). Even if it wanted to, such a provision could not pass constitutional muster.

The application of §1981 to private acts, by the courts, is of a very limited nature, and of recent vintage. It has never before been decided that it applies to purely private schools. (It may be further pointed out that there is a marked split of opinion in its application, even in the limited area of decision.)

In *Jones* v. *Alfred Mayer & Co.*, (392 U.S. 409, 88 S. Ct. 2186, [1968]) this court held §1982 applicable to certain private discriminatory acts and by way of dicta alluded to §1981 as being cut from the same mold, and, thus has been subsequently interpreted by some courts as applicable to some private acts. [Even here, there is a decided split among the courts regarding this application, with cases on both sides of the issue.]

It should be pointed out that Jones *did not* involve §1981 and dealt with real estate on the public market.

The dissent in "Jones" clearly focusses on the rationale of §1982 and puts it in proper perspective. There the Honorable Justices Harlan and White seriously question the majority opinion, and the construction of §1982.

At 88 S.Ct. pp. 2208 et seq., Mr. Justice Harlan traces the civil rights legislation and points up the legislative history and court decisions as prohibiting "state" action as opposed to private action.

See: (*Corrigan* v. *Buckley,* 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969), (*Hurd* v. *Hodge,* 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187)

See also: (*Moose Lodge* v. *Irvis,* 407 U.S. 173, 92 S. Ct. 1965 [1972]), (*McDonald* v. *Shawnee Country Club Inc.,* 438 F.(2d) (632), (*Wesley* v. *City of Savannah,* 294 F.Supp. 698), (*Sims* v. *Order of Commercial Travelers,* 433 F.Supp. 102 [D. Mass. 1972]).

The Right of Parents and of Private Schools To Freedom of Choice As To Admission Policies and Private School Selection Is Protected by the First Amendment of the Constitution.

The right to a public education is certainly clothed with state action and public interest. Therefore there could not and should not be any discriminatory policies of any type under any guise. However, there is no civil right nor constitutional right to a private education. It is inescapable that the task of educating is a 1st Amendment right of parents, as a freedom of choice and freedom of association and expression, protected by the Constitution. (*Pierce* v. *Society of Sisters,* et al, 268 U.S. 510, 45 S.Ct. 571 [1925]). This case cuts through the argument of public responsibility and

police power, and resolves the question of parental rights protected by the 1st Amendment in declaring a state compulsory education act as violative of the 14th Amendment. See also *Wisconsin* v. *Yoder,* (92 S.Ct. 1526, [1972]).

In *Moose Lodge No. 107* v. *Irvis, supra,* this Honorable Court specifically held that the equal protection clause prohibits discriminatory action by the state, but *"erects no shield" against private conduct,* however discriminatory or wrongful. (See also *Shelley* v. *Kramer,* 334 U.S. 1, 68 S.Ct. 836, 92 L. Ed. 1161 [1948], *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed. (2d) 45 [1951].)

The case of *Tillman* v. *Wheaton Haven Recreation Association* 410 U.S. 431, did not involve a private club and was limited in its scope to just that and no more. As a matter of fact the court pointed out it was *not* deciding the issue of a private club.

And in *Norwood* v. *Harrison* (93 S.Ct. 2804 [1973]), the court in striking down a state law, in essence said that private schools have a right to exist and operate, *and absent state involvement a purely private school can have discriminatory policies* and not be in violation of the Constitution.

See also *Riley* v. *Adirondack School for Girls* (368 F.Supp. 392, [1972]).

The Constitution was never meant to be a vehicle by which to deprive people of individual rights, freedom to choose and freedom of association. It could never be the intention of Congress or any other body, politic, judicial, or otherwise, to eliminate private schools. Every one has a right to a public education, should they so desire. The effect of the court's ruling is to destroy

the private school system, and creates for all practical purposes a *de facto* public school system. The argument that this is a constitutional protected contractual right does not come to grips with the real issue that each citizen in his or its private conduct has a freedom of choice protected by the Constitution. And this private conduct even includes the right to discriminate, if it so desires, absent state action.

"Equality" cuts both ways, and eliminating the philosophical and emotional approach, these individual rights go to the very core of our democracy. Destroy them and you undercut the basic vitality and fibre of a free society.

42 U.S.C.A. § 1981 as Interpreted by the Court, is Unconstitutional, Class Legislation, and/or Unconstitutionally Applied. It is Beyond the Power of Congress to Legislate Against Purely Private Conduct.

The Constitution cannot be an instrument for special or class legislation, but must be interpreted to apply equally to all.

The district court, in its opinion decided that §1981 only restricts "whites" and has no application to any other race. (See footnote of district court's opinion [363 F.Supp. 1200, at p. 1204].) As the dissent ably points out (see U.S.C.A. 4th Circuit—*McCrary, et als* v. *Runyon, et als,* No. 73-2348) at p. 33 that this certainly is an unconstitutional application of the statute, assuming the statute is constitutional.

Constitutional amendments and federal statutes dealing with race or color have been interpreted and applied not to discriminate in favor of Negroes but to prevent discrimination against them, not to make but to prevent

a different rule for Negroes than for whites. (*Hampton* v. *Thompson,* [C.A. Tex. 1949], 171 F.(2d) 535.)

Certainly, no court can ever force a person to enter into a contract against his will, and that is what we are concerned with here. The law has always required a meeting of the minds, that is an offer and acceptance, mutually, not unilaterally.

In the Civil Rights cases (3 S.Ct. 18,109 U.S. 3, 27 L.Ed. 836, [1883]) this court specifically held that Congress *did not* have the power to legislate on subjects that are within the domain of state legislation but to provide relief against state action or legislation. And as to contracts it held specifically that Congress *did not* have the power to provide laws for the general enforcement of contracts. The court further pointed out that class legislation is prohibited and absent any state involvement, the power of Congress is curtailed. The Congress has no constitutional power to restrict purely individual and private conduct, nor can it protect so-called civil liberties absent state action. (*Robeson* v. *Finelli,* D.C.N.Y. 1950, 94 F.Supp. 62.)

The Honorable Justice Harlan, in his dissent, joined by Honorable Justice White, in the *Jones* case, alludes to the question here raised, regarding this constitutional infirmity. (See 88 S.Ct. pp. 2208-9.)

The 14th Amendment requires state action. The 13th Amendment only dealt with abolition of slavery. Certainly the finding of the court, compelling private individuals to enter into a contract against their will, would seem to reverse history, and in effect compel "whites" into a contract, thus tantamount to making "slaves" of them, since they now have no freedom of choice.

CONCLUSION

A serious and important question of great public concern is involved. The constitutionality of 42 U.S. C.A. §1981 is in serious doubt, the freedom of choice of association by individuals and the very existence of the private schools is in issue.

The issue is one of first impression and great constitutional significance. A Writ should be granted.

Respectfully submitted,

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APPENDIX

EXHIBIT A

SUBCHAPTER I.—GENERALLY

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. § 1977

Historical Note

Derivation. Act May 31, 1870, c. 114. § 16, 16 Stat. 144.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION No. 494-72-A

COLIN M. GONZALES, *et al.*,

Plaintiffs,

v.

FAIRFAX-BREWSTER SCHOOL, INC.,

Defendant,

and

CIVIL ACTION No. 495-72-A

MICHAEL C. MCCRARY, *et al.*,

Plaintiffs,

v.

RUSSELL L. RUNYON, *et al.*,

Defendants,

and

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,

Intervenor-Defendant.

Memoradum Opinion and Order

(Filed July 27, 1972)

On May 17, 1954, the Supreme Court decided *Brown* v. *Board of Education*, 347 U.S. 483 (1954) The same year Fairfax-Brewster School was founded. It commenced operations in 1955. In 1958 Bobbe's Private School commenced operations. Neither school receives any assistance, financial or otherwise, from any state, local or federal agency; and each relies entirely on funds derived from tuition paid by students to support its operations. In 1956 Fairfax-Brewster commenced operation of a summer day camp and in 1967 Bobbe's did the same thing.

The enrollment at Fairfax-Brewster School grew from an average of 21 in the first year, 1955-56, to 223 in the year 1972-73. The rise in enrollment has generally been increasing except for the year 1969-70 when it dropped to 177 from the previous year's 208. The day camp's enrollment records are not available prior to 1962, but it shows a growth from 21 that year to 236 in the summer of 1972. An unusually large increase was shown in 1969 over the previous year, but this dropped back in 1970.

Bobbe's School grew from 5 in 1958 to an average of 200 in the years 1966-72. The day camp has averaged 100 students per year since its commencement. Neither school has ever had a black enrolled at either its day camp or school. Both schools require submision of an application form, a medical certificate as to the child's health, and a personal interview with the parties.

In early May of 1969, in response to an advertisement appearing in the "yellow pages" of the telephone directory similar to Pltf's Ex. 3, the parents of Colin M. Gonzales, both of whom are black, as is Colin, telephoned and then visited the school where they were shown around. Being pleased with what they saw, they completed, on forms furnished them by the school, an application for the day camp and later a medical certificate prepared by a doctor. They subsequently submitted these to the school with a check for either $15 or $20. On May 16, 1969, Mr. and Mrs. Gonzales received the medical certificate and check in the mail with a form letter from Fairfax-Brewster (Pltf's Ex. 2) stating that the school was "unable to accommodate the application." No reason was given. Upon receipt of the letter Mr. Gonzales called the school, spoke to a person who identified himself as Captain Reiss,[1] and, in response to his inquiry as to why his son's application

[1] Capt. Stuart A. Reiss is the Chairman of the Board while his son, Robert S. Reiss, is the Administrative Director, and his daughter-in-law, Olga M. Reiss, the registrar.

was rejected, was told "we are not integrated." Both Robert S. Reiss and Stuart Reiss denied any such conversation. They then stated that Colin, whom they believed was primarily interested in entering the first grade, was rejected, not on the basis of his race, but because his application lacked supporting data as to his previous schooling. Moreover, knowing that Colin had previously attended Crossroads Day Nursey, they claimed he would not qualify for the first grade. Consequently, since eligibility for the day camp was contingent on one's being qualified for the first grade, they felt it would be unfair to allow Colin to enter the day camp and then have to be withdrawn before the commencement of the academic year. In conclusion, the three Reisses all denied that it was the school or day camp's policy to exclude an applicant because of his race. The Court rejects this testimony as unbelievable and finds that the reason for the rejection was because Colin was black.

Subsequent to his son's rejection by Fairfax-Brewster, Mr. Gonzales telephoned Bobbe's School where, in answer to an inquiry as to whether it was integrated, he was told that only members of the Caucasian race were accepted. He filed no formal application with Bobbe's School.

Application was ultimately made for Colin at Congressional School, a non-public school, where he was accepted and did well.

In August, 1972, in response to an advertisement in the "yellow pages" of the telephone directory, Mrs. Sandra McCrary, who is black, called Bobbe's Private School to enroll her 2 year old son, Michael, in nursery school. After first inquiring as to the price, policies, meals, transportation and facilities for "toilet training," she asked if the school was integrated. Upon receiving a negative reply, she asked if the school accepted black children. The answer to this question was also "no." She filed no formal application with Bobbe's.

Bobbe's denied receiving telephone calls from either Mr. Gonzales or Mrs. McCrary; stated that it was not the policy of the school to exclude anyone because of race; denied that the school has ever told anyone that the school was not integrated; and stated that no one can be considered without a personal interview with the applicant and his parents or without a formal application being submitted with an accompanying medical certificate. Bobbe's introduced further testimony that no black child had ever applied for enrollment.

The Court finds that the calls were made to Bobbe's and that both Colin Gonzales and Michael McCrary were denied admission because they were black. It is of no moment that no formal application was filed. It would be ridiculous to require this of the plaintiffs after they had effectively been told its was useless.

The policy of the schools with regard to exclusion of blacks was corroborated by Mrs. Bryant and Mr. Brooks. The former testified that in 1972 she telephoned Fairfax-Brewster and Bobbe's School to inquire about their admission policies. She testified that both schools told her they were not integrated and would not accept blacks. Mr. Brooks, a deputy Equal Employment Opportunity Commission officer with the Navy and Mrs. McCrary's supervisor, testified that after he became aware of the McCrary's allegations as raised in this suit against Bobbe's he decided to call for himself. He stated that during his telephone conversation of May 31, 1973, with a Mr. Gates at Bobbe's, he asked whether the school was accredited and if it was integrated. Upon receiving a negative response to the latter question Brooks further asked if blacks were admitted. Again he was told "no."

Colin Gonzales has filed an action against Fairfax-Brewster. Mr. and Mrs. McCrary, Michael McCrary, and Coline Gonzales have filed an action against Bobbe's. The

sole basis for the actions is 42 U.S.C. § 1981.[2] The Southern Independent School Association intervened as a party-defendant in the action against Bobbe's asserting that it represents "non-profit, private white schools in seven states and the class of all similarly situated schools and their associated students and parents."

The intervenor takes a different tack from that of the principal defendants. It concedes that race is a factor in its policies of exclusiveness, but says that 42 U.S.C. § 1981 cannot be used to compel admission of a black child to a white school of the type it represents, and prays an adjudication to that effect.

The actions were consolidated and tried on July 16 and 17, 1973.

No determination was made prior to trial that the actions might be maintained as a class action, either as asserted by the plaintiff or the intervenor; and the Court does not feel it should be so maintained. Accordingly the decision is only binding on the named plaintiffs, the named defendants, and those schools which actually comprise the intervenor.

42 U.S.C. § 1981 reads as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

If read literally the act covers these plaintiffs, who have been denied their right to make a contract with the defend-

[2] Originally 42 U.S.C. § 2000a was alleged as a basis for the actions. This was withdrawn prior to trial.

ants because they are not white. That is to be read literally is no longer open to question. In considering 42 U.S.C. § 1982, the Supreme Court has said that ". . . Congress meant exactly what it said." *Jones* v. *Mayer Co.*, 392 U.S. 409, 422 (1968). Interrelated as § 1981 and § 1982 are, there is no reason to think Congress meant any less when it enacted § 1981. *Tillman* v. *Wheaton-Haven Recreation Ass'n.*, 41 U.S.L.W. 4311 (February 27, 1973). The purpose of both is to prohibit all racial discrimination against non-whites,[3] whether that infringement be "by 'State or local law,'" or "by 'custom, or prejudice.'" *Jones* v. *Mayer Co., supra.* at 423. In other words, no state action is necessary to invoke § 1981.

Although both schools claim to have strictly established criteria for enrollment, the end result of their admission policies as applied to both Colin and Michael evidences no "plan or purpose of exclusiveness" for selection of students "*other than race.*" (Emphasis added.) *Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 236 (1969). This disposes of the argument that these were "truly private" schools since the opportunity to attend these schools was open to every white child. *Tillman,* at 4313 and 4314. It is difficult to accept the defendants' argument that the plaintiffs may not have been qualified to meet their schools' high standards. This answer is certainly unavailing with regard to the day camp or nursery and is suspect insofar as the first grade is concerned since Colin Gonzales, be-

[3] The analogy to all black academies, all Chinese schools, and all rabbinical schools is inapposite. These institutions don't fall within the proscription of § 1981. Whatever else may be said of their policies, those institutions are free to discriminate against whites, or against other non-whites if whites are similarly discriminated against, without running afoul of § 1981.

cause of his race, was never given the opportunity to demonstrate that he was qualified.[4]

Intervenor proffered testimony which would establish:

1. That intervenor parents act rationally in holding a belief that segregation is desirable in education in light of the performance record of these schools and current scientific theory; and

2. That the intervenor schools are academically successful beyond the national public school average and have low disciplinary problems, both of which are causally related to segregated policies.

The Court finds this testimony to be irrelevant to the issue in these actions, feeling that such testimony, as a defense to outlawed policies of segregation, embodies a concept rejected in *Brown* v. *Board of Education, supra.*

Intervenor has seized on certain dicta of the Supreme Court in *Norwood* v. *Harrison*, 41 U.S.L.W. 5094 (June 25, 1973), which states that "private bias" is not proscribed by the Constitution and that "private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment. . . ." Comforting as these words may be to the defendants out of context, it must be pointed out that § 1981 was not there involved; that *Jones* v. *Mayer Co.* was cited to the contrary as an example of private discrimination made unlawful by Congress; and that the opinion specifically points out that "[t]his case does not raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race or religion. . . ." *Norwood* v. *Harrison*, at 5095. Moreover, although perhaps not legally significant, as a practical consideration, it is inconceivable that the opinion in the case would have attained the indicated degree of unanimity if it stood for the proposition urged by the intervenor. Accordingly the Court feels *Norwood* is not authority for that proposition.

[4] The defendant Fairfax-Brewster points to page 2 of its handbook (Def's Ex. 2) to indicate that Colin Gonzales should have submitted a report card and other pertinent records from his previous school, the omission of which was a ground for his rejection. The same page of the handbook provides for Entrance Examination if previous scholastic records are inadequate. Colin was denied the opportunity to take this examination since he was never told that his scholastic record inadequacy was the reason for his rejection.

While no relief is sought under 42 U.S.C. § 2000a et seq., it seems appropriate to point out that, in the Court's view, this act is not a limitation on § 1981, and consequently the exemption of 42 U.S.C. § 2000a(e) for private establishments does not apply in this case. Moreover, as indicated before, *Sullivan* v. *Little Hunting Park* has abolished traditional notions of what is "private" insofar as these types of actions are concerned.

Plaintiffs are accordingly entitled to the relief requested, namely:

A. An adjudication that the policies with respect to the admission of students to defendants' day camp and school, of discriminating on the basis of race or color, are a violation of 42 U.S.C. § 1981.

B. A permanent injunction against the defendants and intervenor, their agents and those acting in concert with them, prohibiting them from following the policies described in Paragraph A.

C. An award of compensatory [5] damages for the embarrassment, humiliation and mental anguish which the Court finds to have been suffered by the plaintiffs as follows:

1. In favor of Colin Gonzales:	
(a) Against Fairfax-Brewster School	$2,000
(b) Against Bobbe's School	500
2. In favor of Michael McCrary against Bobbe's School	1,000
3. In favor of Sandra McCrary and Curtis L. McCrary against Bobbe's School	2,000

D. An award of attorney's fees as follows:

1. Against Fairfax-Brewster School	$1,000
2. Against Bobbe's School	1,000

E. Their costs.

And it is so ordered.

/s/ A. V. B.
United States District Judge

Alexandria, Virginia
July 27, 1973

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[5] Punitive damages are not awarded. While the defendants' acts have here been declared improper, insofar as the Court can determine similar acts have not heretofore been so declared. Accordingly the defendants cannot be said to have acted recklessly or wilfully in disregard of clear existing law.

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2348

MICHAEL C. MCCRARY, INFANT BY CURTIS L. MCCRARY AND SANDRA MCCRARY AND COLIN M. GONZALES, INFANT BY RAYMOND GONZALES AND MARGARET R. GONZALES,
Appellees,

v.

RUSSELL L. RUNYON, KATHERYNE E. RUNYON,
Defendants,

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,
Appellant.

No. 73-2349

MICHAEL C. MCCRARY, INFANT BY CURTIS L. MCCRARY AND SANDRA MCCRARY AND COLIN M. GONZALES, INFANT BY RAYMOND GONZALES AND MARGARET R. GONZALES,
Appellees,

v.

RUSSELL L. RUNYON, KATHERYNE E. RUNYON,
Appellants.

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,
Defendant.

No. 73-2350

MICHAEL C. MCCRARY, INFANT BY CURTIS L. MCCRARY AND SANDRA MCCRARY,
Plaintiffs,

COLIN M. GONZALES, INFANT BY RAYMOND GONZALES AND MARGARET R. GONZALES,
Appellants,

v.

RUSSELL L. RUNYON, KATHERYNE E. RUNYON
SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,
Appellees.

No. 73-2351

COLIN M. GONZALES, INFANT BY HIS PARENTS, RAYMOND GONZALES AND MARGARET R. GONZALES,

Appellees,

v.

FAIRFAX-BREWSTER SCHOOL, INC.,

Appellant

No. 73-2352

COLIN M. GONZALES, INFANT BY HIS PARENTS, RAYMOND GONZALES AND MARGARET R. GONZALES,

Appellants,

v.

FAIRFAX-BREWSTER SCHOOL, INC.,

Appellee.

Argued April 2, 1974

Decided April 15, 1975

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Before Haynsworth, Chief Judge ,and Winter, Craven, Butzner Russell, Field and Widener, Circuit Judges, sitting en banc.

George S. Leonard and Louis Koutoulakos for Appellants in Nos. 73-2348, 73-2349 and 73-2350; Andrew A. Lipscomb (Gary R. Sheehan and Tolbert, Lewis and Fitzgerald on brief) for Appellants/cross-Appellees in Nos. 73-2351 and 73-2352; (Thomas J. Schwab on brief for

Amici Curiae in Nos. 73-2348, 73-2349 and 73-2351; Allison W. Brown, Jr., (Robert M. Alexander and Roderick V. O. Boggs on brief) for Appellees/cross-Appellants in Nos. 73-2348, 73-2349, 73-2350, 73-2351 and 73-2352.

HAYNSWORTH, *Chief Judge:*

The issue in this case is whether 42 U.S.C.A. § 1981 [1] prohibits private schools from denying admission to qualified black applicants solely on the basis of their race.

This appeal is a consolidation of two suits initiated by parents of black children who claim that they were denied admission to the appellant schools because of their race.

The Southern Independent School Association intervened in these actions, alleging that it is an association representing over 300 private, non-profit schools in the South, some of which concededly are racially exclusive in their admission policies. The position of the intervenor is simply that racial discrimination by private schools is not prohibited by § 1981, and, in any event, cannot be constitutionally prohibited.

I.

As found by the trial judge, in early May 1969, the parents of Colin Gonzales contacted the Fairfax-Brewster School, a private school located in Fairfax County, Virginia, about enrolling their son in the school's summer day camp prgoram, and continuing into the first grade in the fall. The Gonzales' learned of Fairfax-Brewster through

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[1] "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

a mass mailing addressed to "President," an advertisement in the Yellow Pages in the telephone book, and from a friend whose son attended the Summer Camp.

Thereafter, the Gonzales visited the school and, being pleased with what they saw, completed an application for their son. They also furnished, as required, a medical certificate and application fee. On May 16, 1969, the medical certificate and application fee were returned, accompanied by a form letter stating that the school was "unable to accommodate the application." No further explanation was given.

Mr. Gonzales called the school and spoke with someone who identified himself as Captain Reiss. In response to Mr. Gonzales' inquiry as to why his son's application was rejected, he was told that the school was not integrated.

Captain Reiss is the Chairman of the Board of Fairfax-Brewster School. His son, Robert, is the Administrative Director, and his daughter-in-law Olga is the Registrar.

Both Captain Reiss and his son deny any such conversation. They testified that Colin, age 5½, was rejected because they felt that the kindergarten he had previously attended gave Colin insufficient preparation for the first grade at Fairfax-Brewster. Because they found Colin unqualified for the first grade, the Reisses concluded that "there was no point" in allowing him to enter the summer camp only to have to "yank him out" at the beginning of the academic year.

Subsequent to their son's rejection from Fairfax-Brewster, the Gonzales telephoned Bobbe's School, and were told that only members of the Caucasian race were accepted.

In August 1972, Mrs. McCrary called Bobbe's School about enrolling her two year old son, Michael, in the nursery school. She asked whether the school was integrated and accepted blacks, and was told it did not. She did not file a formal application with Bobbe's.

Mr. Gates, the superintendent of Bobbe's, testified that he never received a call from either the Gonzales or Mrs. McCrary. He testified that the school does not discriminate on the basis of race, although he said that no black child had ever applied.

The district court found the testimony of the Reiss "unbelievable," and concluded that Colin had been rejected from Fairfax-Brewster because of his race. He further found that both the Gonzales and Mrs. McCrary had called Bobbe's and had been told that the school would not accept blacks. It held that "[i]t is of no moment that no formal application was filed. It would be ridiculous to require this of the plaintiffs after they had effectively been told it was useless."

Accordingly, the court concluded that the appellant schools practiced racial discrimination in their admissions policies.

On the authority of *Jones* v. *Alfred H. Mayer Co.* 392 U.S. 409 (1968), *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) and *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973), it held that § 1981 prohibits racial discrimination in private contractual arrangements, even when there is no state involvement. Therefore, it held that the schools were in violation of § 1981 in their admissions policies, and permanently enjoined defendants and intervenors from discriminating against blacks in enrollment in their schools. In addition, it awarded damages for embarrassment, humiliation and mental anguish to Colin, Michael and Michael's parents, and attorney's fees against Fairfax-Brewster and Bobbe's. *Gonzales* v. *Fairfax-Brewster School, Inc.*, 363 F. Supp. 1200 (E.D. Va. 1973).

Defendants and intervenor appeal. We affirm the injunction and the award of damages, but reverse the award of attorney's fees.

II.

Initially, the appellants contest the district court's findings of facts, urging that the district court was clearly erroneous in concluding that Fairfax-Brewster and Bobbe's practice racial discrimination.

There was conflicting testimony as to whether the Gonzales had been told that Fairfax-Brewster was not integrated and whether both the McCrarys and Gonzales were told that Bobbe's was not integrated. Resolution of this conflict depended upon the district court's evaluation of the credibility of the witnesses. We may not reverse a trier of fact, who had the advantage of hearing the testimony, on a question of credibility.

In addition, the testimony of the black parents was corrobrated and supported by the testimony of two other witnesses. Mrs. Bryant testified that she had telephoned Fairfax-Brewster and Bobbe's to inquire about their admissions policies and was told that the schools were not integrated. Mr. Brooks, Mrs. McCrary's supervisor at her job, testified that a Mr. Gates, at Bobbe's told him, over the telephone, that Bobbe's did not accept blacks.

The trial judge also thought that the Reiss's story that Colin was rejected on educational rather than racial grounds was undercut by the fact that Fairfax-Brewster allows applicants to take an entrance examination when previous scholastic preparation is inadequate. Colin was not given this opportunity.

In short, there is ample evidence in the record to support the trial judge's factual determinations, and we are unable to say that, viewing the record as a whole, he was clearly erroneous in concluding that Colin and Michael were denied admission to the schools because of their race.

III.

The substantial legal questions, which have been the subject of varied comment in the literature,[2] we think were correctly resolved by the district court. Section 1981 is a limitation upon private discrimination, and its enforcement in the context of this case is not a deprivation of any right of free association or of privacy of the defendants, of the intervenor, or of their pupils or patrons.

A.

It may once have been supposed that § 1981 served only the limited office of removing legal disabilities which state statutes imposed upon black people. It, of course, did cancel state statutes which imposed restrictions upon the right of blacks to contract, but the Supreme Court has clearly held that it did much more than that. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229; *Tillman* v. *Wheaton-Haven Recreational Assn.*, 410 U.S. 431 (1973).

In *Jones* v. *Mayer*, the Court was concerned with the right to purchase real estate. There a real estate developer had refused to sell a residence in a "white area" to the black plaintiff. Analyzing the text and legislative history of § 1 of the Civil Rights Act of 1866,[3] the Court held

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[2] *See*, Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449 (1974); Note, Desegregation of Private Schools: Section 1981 as an Alternative to State Action, 62 Geo. L. J. 1363 (1974); Note, Segregation Academies and State Action, 82 Yale L.J. 1436 (1973); Comment, Jones v. Alfred H. Mayer Co. Extended to Private Education: Gonzales v. Fairfax-Brewster School, Inc., 122 U. Pa. L. Rev. 471 (1973); Recent Decisions, 45 Miss. L.J. 246 (1974); Recent Decisions, 8 U. Rich. L. Rev. 285 (1974); Recent Cases, 42 U. Cin. L. Rev. 767 (1973); Recent Cases, 26 Vand. L. Rev. 1307 (1973).

[3] 14 Stat. 27.

that § 1982 applied to purely private activity and provided a judicial remedy. As so construed, it was held that enactment of § 1982 was a valid exercise of the power of Congress under the enforcement clause of the Thirteenth Amendment, which gave Congress power to "pass all laws necessary and proper for abolishing all badges and incidents of slavery."[4] The Court concluded that, unlike the Fourteenth Amendment, the Thirteenth reached private conduct in which no state action was involved.

As an intellectual exercise, the historical reading and interpretation of the majority in *Jones* v. *Mayer* may be debatable. *See* VI History of the Supreme Court of the United States; Fairman—Reconstruction and Reunion, 1207 et seq. That reading and interpretation was followed in *Sullivan* v. *Little Hunting Park* and in *Tillman* v. *Wheaton-Haven,* however, and, for us, is firmly established.

Jones v. *Mayer,* of course, dealt with § 1982, assuring the right to purchase property. We deal with § 1981, assuring the right to contract, but both sections derive from § 1 of the Civil Rights Act of 1866. Both are subject to the same analysis and must be interpreted in the same light. In *Tillman* v. *Wheaton-Haven,* the claim of the guest and the host rested upon § 1981. The Supreme Court expressly noticed the relation between § 1981 and § 1982, their common derivation from § 1 of the Civil Rights Act of 1866 and the necessity of according them similar interpretation.

It is contended here, however, that § 1981 confers no right of action unless the contract denied the aggrieved person was open to all white people. It seems obvious that the relationship between the school on the one hand and a pupil and his parent on the other hand is a contractual one and that admission is a part of the process of forming such a contractual arrangement. It is also true that admission to the school is not open to all white people because there are

[4] Civil Rights Cases, 109 U.S. 3, 20 (1883).

academic, financial and other restrictions upon admission. Within the qualified class, however, there is no other limitation upon the admission of white applicants up to the school's capacity.

We may not read § 1981 so restrictively as the schools would have us to do it. The school may not refuse with impunity to accept an otherwise qualified black applicant simply because it declines to admit unqualified white applicants. The section is violated by the school as long as the basis of exclusion is racial, for it is then clear that the black applicant is denied a contractual right which would have been granted to him if he had been white.

What we have said should not be read to call into question the right of the school to insist upon an evenhanded requirement of academic and other racially neutral qualifications. Indeed, the right of the school to be selective on those basis is unquestioned here. All that is contended and all that we hold is that § 1981 prohibits the rejection of a black applicant when his qualifications meet all other requirements and race is the only basis for his rejection.

B.

As applied here, we see no violation of any constitutionally protected rights of free association and of privacy.

There is a protected right of free association. As stated by the Supreme Court in *NAACP* v. *Alabama,* 357 U.S. 449 (1958), "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of * * * freedom of speech." *Id.* at 460. The constitutional protection, however, is essentially an attribute of First Amendment rights and would not ordinarily justify exclusion of others sharing the same beliefs and ideas. Here, at least, there is no showing that discontinuance of their discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.

Nothing in § 1981 impedes parents in their exercise of a choice of a private school presenting ideas or having educational methods or practices which are not available in the public schools. They may do the same thing to avoid ideas and influences in the public schools which they regard as unhealthy. See *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Among private schools, they are free to prefer one with a certain curriculum or dogma over others, but the school, while it may exclude applicants on the basis of neutral principles, may not exclude on the basis of race.

There is also a right of privacy. Its constitutional basis may be elusive, but it has clearly been held to exist. *Roe* v. *Wade*, 410 U.S. 113 (1973); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

Though certain intimate and private affairs of men and women are protected from governmental interference, the schoolhouse is far from the realm of protection. The right is appropriately recognized in certain instances when only a few people are involved in activity unintended for the public view. In such instances, it is more than likely or inevitable that there is some plan or purpose of exclusiveness other than race. When relations between husband and wife are involved, their purpose to exclude all the rest of the world has no racial connotations. When a school holds itself open to the public, however, or even to those applicants meeting established qualifications, there is no perceived privacy of the sort that has been given constitutional protection.

Indeed, § 1981 does not purport to reach all private associations. It reaches only those which evidence "no plan or purpose of exclusiveness" other than race. *Sullivan* v. *Little Hunting Park*, supra. Private associations having non-racial criteria for the selection of members may apply their criteria, even if it results in a disproportionate impact upon the members of one race. It is only when blacks are excluded because they are black, or denied a

right to contract which would be granted were they white, that § 1981 is violated.

Nor do we read anything in *Norwood* v. *Harrison*, 413 U.S. 455 (1973), as holding that rights of association or rights of privacy, or both combined, prevent the application of § 1981 here. In *Norwood* the Supreme Court struck down a Mississippi statute giving free textbooks to all students, including those attending private, segregated schools. Mississippi contended that its failure to furnish free textbooks to students in private, segregated schools would violate the equal protection clause and would undermine the right of the parents to send their children to private schools. In answer, the Court observed that because "the Constitution may compel tolerance of private discrimination in some circumstances does not mean that it requires state support for such discrimination." "413 U.S. at 463.

The observation in *Norwood* is far from a holding that segregation in a private school is constitutionally protected. Earlier in the opinion the Court had observed that no such question was presented. 413 U.S. at 457. Nor are we met with the question whether segregation in private schools is itself a violation of the Thirteenth or Fourteenth Amendment. We deal with a specific statute passed in implementation of the Thirteenth Amendment. *See Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449 (1974).

Finally, the Court in *Norwood* recognized the thrust of § 1981 and § 1982 when it noted that private discrimination "has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment." 413 U.S. at 470. We deal with such circumstances. In short, we cannot read *Norwood* as a holding that segregation in private

schools such as these is constitutionally protected so as to be beyond the reach of § 1981.

C.

Some schools may be so private as to have a discernible rule of exclusivity which is inoffensive to § 1981. Should siblings combine to employ tutors for their children ,they may exclude the rest of the world, for the rule of exclusivity bars the more distantly related and the unrelated regardless of race. The schools here are not private in that sense, and there is no discernible neutral rule of exclusivity which would bar these plaintiffs. The schools are private only in the sense that they are managed by private persons and they are not direct recipients of public funds. Their actual and potential constituency, however, is more public than private. They appeal to the parents of all children in the area who can meet their academic and other admission requirements. This is clearly demonstrated in this case by the public advertisements. Within that constituency, they may not exclude a black applicant, solely because of his race, while accepting white applicants with comparable qualification.

IV

The district court awarded damages for embarrassment, humiliation and mental anguish suffered plus an award of attorney's fees. The schools complain of both.

A.

It is not helpful to state decisions in personal injury tort cases in which damages for such injuries are denied.[8]

[8] After the recent decision of the Virginia Supreme Court in *Womack* v. *Eldridge*, 43 U.S.L.W. 2267 (Va. December 2, 1974), it is arguable that the plaintiffs here could recover damages in a state tort action for emotional distress. For an earlier discussion of Virginia's requirement of a resulting physical injury in distress cases, see *Hughes* v. *Moore*, 214 Va. 27, 197 S.E.2d 214 (1973).

That damages are recoverable for violations of §§ 1981 and 1982 is established by *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 240, in which we are told "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes."

Section 1981 doubtless was intended to give to the former slaves access to opportunities for material betterment of themselves, but it was also intended to remove the stigma which accompanied the disabilities under which they formerly had labored. The plain command of the statutes is that those formerly enslaved henceforth shall be treated as having all of the rights and dignity of other people dwelling with them in a land of freedom. A denial of those statutory rights is treatment of the victim as being subject to those earlier disabilities. It is an affront, of which embarrassment and humiliation are natural consequences. If the statute is to be enforced fairly, if injuries suffered directly because of its violation are to be fairly compensated, damages for embarrassment and humiliation must be recoverable in a case such as this.

B.

The award of attorney's fees stands in a different posture. It is one thing to award damages for the invasion of a legal right and quite another to impose all of the litigation costs on the defendant. Unlike damages, attorney's fees have been granted only in narrowly defined circumstances.

We have recognized the propriety of an award of fees when a party maintained his position in bad faith, displaying "obstinate obduracy." *Brewer* v. *School Board of City of Norfolk*, 4 Cir., 456 F.2d 943, 948-52. The district court, however, made no finding of "obstinate obduracy."[9]

[9] In refusing punitive damages, the district court found that the defendants had not "acted recklessly or wilfully in disregard of clear existing law." 363 F. Supp. at 1255 n.3.

and we can see no basis for such a finding. Since this suit involves a novel application of a recently revived statute, the litigation of the issues cannot be equated with the recalcitrance we found in *Brewer*. Although at trial the parties recounted different versions of the facts and the court accepted the plaintiffs' story, the finding suggests no bad faith or perjury. Faults in perception or memory often account for differing trial testimony, but that has not yet been thought a sufficient ground to shift the expense of litigation.

Attorney's fees, of course, are available where Congress has expressly authorized them. A conspicuous example is Title II of the 1964 Civil Rights Act.[7] *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Section 1981 never contained a provision for fees, and although the Emergency School Aid Act of 1972 expressly allows fees in suits to desegregate public or federally aided secondary or elementary schools,[8] plaintiffs have made no showing of federal aid to, or state action by, the defendants.

In the absence of expressed congressional direction, we are presented with the question whether to adopt a "private attorney general" theory. Although application of that theory may be proper in some actions based on the 1866 and 1870 Civil Rights Act, it would be inappropriate in this case. In considering an award of fees in an action based on the older civil rights statutes, we look to more recent congressional determinations that a policy is so

[7] 42 U.S.C. § 2000a-3(b).

[8] 20 U.S.C. § 1617 (allowing fees against a "local educational agency, a State . . . or the United States" for a violation of that Act, Title VI of the 1964 Civil Rights Act or the Fourteenth Amendment). *See* Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974); Northcross v. Board of Education of the Memphis City Schools, 412 U.S. 427 (1973).

important or public enforcement mechanisms are so ineffective that attorney's fees are necessary to promote private enforcement. Mere provision of a private cause of action is not sufficient. A statutory grant of attorney's fees in suits covering the same subject matter, however, would be a strong indication of such a congressional determination.

In *Lee* v. *Southern Home Sites Corp.*, 5 Cir., 444 F. 2d 143, Judge Wisdom looked to the enactment of the Fair Housing Law of 1968, which contained a fees section, 42 U.S.C. § 3612(c), in deciding that fees were available to a plaintiff seeking to redress racial discrimination in the sale of houses under § 1982. In 1968 Congress had acted, pursuant to its powers under the Thirteenth Amendment,[9] to prohibit discrimination in the sale of private housing.[10] In Lee's § 1982 action, he proceeded against precisely the discrimination that Congress had sought to curb by providing for an award of reasonable fees for his attorney to a prevailing plaintiff in a private enforcement action.

Employment discrimination suits provide another example of judicial allowance of fees under the older, more general civil rights statutes. We have recognized that a plaintiff under Title VII might recover attorney fee.[11] Reaching beyond Title VII, courts have allowed fees in actions brought under the older civil rights statutes to eliminate similar employment discrimination. *Fowler* v. *Schwarzwalder*, 8 Cir., 498 F.2d 143, (1[1] 1981, 1983); *Harper* v. *Mayor and City Council of Baltimore*, D. Md. 359 F. Supp. 1197, 1218-19, *modified on other grounds sub nom.*,

[9] United States v. Hunter, 4 Cir., 459 F.2d 205, 214.

[10] After December 31, 1968 the Act applied to all dwellings, 42 U.S.C. § 3603 (a)(2), except those enumerated in § 3603(b). In *Lee* it was not clear whether the Act applied since the transactions occurred before December 31, 1968, and evidence on the applicability of § 3603 (a)(1), which covered that period, was not recounted in the opinion.

[11] 42 U.S.C. § 2000e-5(k); Lea v. Cone Mills Corp., 4 Cir., 438 F.2d 86; Robinson v. Lorillard Corp., 4 Cir., 444 F.2d 791.

Harper v. *Kloster*, 4 Cir., 486 F.2d 1134 (§§ 1981, 1983); *Cooper* v. *Allen*, 5 Cir., 467 F.2d 836 (§ 1981). In *Cooper* the plaintiff based his suit on racial discrimination in hiring by a municipal golf course, but he failed to go through the conciliation procedures of Title VII and could not proceed under the statute. Nevertheless, Congress had authorized fees in the similar Title VII action to encourage private elimination of such discrimination. Where plaintiffs advance precisely the same congressional goal by the use of a more general statute, they may be entitled to attorney's fees. That is not to say, however, that once fees are awarded in any § 1981 or § 1982 case, they should always be granted in actions based on those statutes. The focus of the inquiry should be whether the plaintiffs advanced a goal the attainment of which Congress sought to further by providing for the recovery by a prevailing plaintiff of his attorney's fees.

In this case the plaintiffs have not acted to foster a goal that Congress deemed so urgent. The Emergency School Aid Act spoke only to desegregation actions against public and federally aided schools. Unlike the Federal Housing Law or Titles II and VII of the 1964 Civil Rights Act, the statute does not aim to eliminate discrimination from a facet of private American life. The limitation in that statute to public schools is not merely a technical or procedural restriction, but goes rather to the substance of the congressional goal. Without some congressional direction, even by analogy, we will not award attorney's fees, but will adhere to the usual rule that prevailing plaintiffs may not recover attorney's fees,[12] for we find none of the recognized exceptions applicable.[13]

AFFIRMED IN PART.

REVERSED IN PART.

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[12] Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967).

[13] See Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

BUTZNER, *Circuit Judge*, concurring in part and dissenting in part:

I concur in Parts I, II, III, and IV-A of the opinion. I dissent from Part IV-B which reverses the district court's allowance of attorney's fees. I would adhere to our practice of sustaining a district judge who, for reasons, has allowed attorneys' fees. His discretion can be justified in this case on two grounds: the appellees acted as private attorneys general, and, alternatively, the appellants' defense was tainted by obdurate obstinacy.

By prosecuting this single case, the appellees invalidated the racially exclusive admission practices of over three hundred schools represented by the Southern Independent School Association, as well as the practices of Fairfax-Brewster and Bobbe Schools. In so doing, they vindicated congressional policy by abolishing an aspect of racial discrimination prohibited by the Civil Rights Act of 1866 [42 U.S.C. § 1981]. This type of suit is encompassed by the private attorney general doctrine, which is applicable to suits brought under the Civil Rights Acts of 1866, 1871, and 1964. *See, e.g.*, Newman v. Piggie Park Enterprises, Inc., 390 U. S. 400 (1968); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., 3-judge court), *aff'd mem.*, 409 U.S. 942 (1972). Under this doctrine, the award is not dependent on proof of bad faith, for good or bad faith is irrelevant. Brandenburger v. Thompson, 494 F.2d 885, 888 (9th Cir. 1974). Nor does the receipt of compensatory damages preclude an award of attorneys' fees, Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972), though, of course, a court may take damages into account when awarding a fee. *See* Lee v. Southern Home Sites Corp., 444 F.2d at 147.

Alternatively, attorneys' fees are justified when defendants display obdurate obstinacy. *See* Brewer v. School Board of City of Norfolk, 456 F.2d 943 (4th Cir.

1972) (dictum). The district court's findings, amply supported by the record, demonstrate that the officers of the schools did not truthfully recount under oath the facts of the case. Such bad faith in the conduct of litigation is a pernicious form of obstinacy that can no more be tolerated than out-of-court bad faith. *Cf.* Hall v. Cole, 412 U.S. 1, 15 (1973). This behavior should not be excused simply because this case involves a novel factual situation. *Cf.* Lea v. Cone Mills Corp., 438 F.2d 86, 88 (4th Cir. 1971); Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 536 (5th Cir. 1970).

Finally, I believe that the enactment of 20 U.S.C. § 1617 directing the allowance of fees in public school desegregation cases does not create an inference that Congress intended to withdraw from district courts "the inherent equitable power"* of a chancellor to allow fees in actions against private schools when the facts otherwise justify the award because the plaintiffs acted as private attorneys general or the defendants displayed obdurate obstinacy. Other courts confronted with analogous problems have not restricted the allowance of fees in suits brought under the earlier Civil Rights Acts to instances where Congress has subsequently authorized fees in related legislation. *See, e.g.*, Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974) (welfare benefits); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., three-judge court), *aff'd mem.* 409 U.S. 942 (1972) (reapportionment). Indeed, the drastic limitation on the allowance of fees in civil rights cases suggested by the majority appears to be without precedent.

Judge Winter and Judge Craven concur in Parts I, II, III, and IV-A of the court's opinion. They join Judge Butzner in dissenting from Part IV-B.

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* *See* Hall v. Cole, 412 U.S. 1, 5 (1973).

RUSSELL, FIELD, and WIDENER, *Circuit Judges*, concurring and dissenting:

I

We concur in the result reached in part IV-B of the opinion of the court. We would not, of course, reach the question of attorney's fees if our view on the merits prevailed. Otherwise, we respectfully dissent.

II

In its opening paragraph, the majority opinion correctly states the legal issue[1] in this case. We add, however, that the issue is presented to this court as one of first instance in any federal court at this or higher level.[2] We are bound by no definitive Supreme Court decision.

The majority regard *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), followed in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Tillman* v. *Wheaton-Haven Recreational Association*, 410 U.S. 431 (1973), as being controlling precedents. We do not so regard those decisions.

We believe that the majority has been unduly impressed by the historical relationship between §§ 1981 and 1982

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[1] We are not convinced that the district court's findings of fact are not clearly erroneous. Such laments, however, being largely unavailing, see *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), we address ourselves to the important legal issue here presented.

[2] In *Grier* v. *Specialized Skills, Inc.*, 326 F. Supp. 856 (W.D. N.C. 1971), the United States District Court for the Western District of North Carolina held the refusal of a barber school to admit black students constituted a violation of § 1981. On the other hand, in *Riley* v. *Adirondack Southern School for Girls*, 368 F. Supp. 392 (C.D. Fla. 1974), the court refused to apply § 1981 to a racially segregated independent school. The decision is based at least in part on factual determinations. See also *Segregation in Private Schools*, 122 U. of Penna. L. Rev. 471, at 475 (1973).

and has failed to discern the difference between the right to purchase real estate and the right to attend an independent school inferred from the right to "make and enforce contracts." The purchase of real estate, with its attending perquisites, is a commercial transaction pure and simple, and many other contracts are likewise purely commercial. On the other hand, the relationship of teacher and student is one of status, which is related to the contract concept in the same way that the status of husband and wife may be said to grow out of contract of marriage. The contract aspect of the situation is minor and incidental and serves no purpose other than as a door opener in the present case to bring independent schools within the scope of § 1981. The right to make and enforce contracts does not imply a right to coerce an unwilling co-contractor into making any and every variety of contract.

The majority opinion also fails to recognize *Moose Lodge* v. *Irvis*, 407 U.S. 163 (1972), and *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974). True, those cases do not involve § 1981 or § 1982, but involve the problem of State action under the Fourteenth Amendment. However, they do show that answers to apparently the same type of technical questions in this field may vary according to the facts of each particular situation.

Legal problems arising out of a purpose to readjust interracial relationships fall into four categories: (1) those arising under the Fourteenth Amendment; (2) those created by the Civil Rights Acts of the 1960's (3) those resulting from conditions imposed by the federal government upon benefits bestowed such as aids to education; and (4) those arising from the resurrection of the post Civil War Civil Rights Act of 1866 and the several acts of the 1870's, now found in 42 USCA §§ 1981, et seq. Legal problems involving the issues regarding the newly enfranchised slaves were acute until the *Civil Rights Cases*, 109

U.S. 3 (1883). Thereafter, such legal problems became stereotyped until the landmark decision in 1954 of *Brown* v. *Board of Education*, 347 U.S. 294 (1954). That case introduced the first of the above four categories, which is still paramount. Racially discriminatory action may be struck down under the Fourteenth Amendment provided State action is involved. In the 1960's, the Congress forbade racially discriminatory practices under the Civil Rights Acts of 1964 and 1968. Those acts did not touch private action in some fields. To cover this hiatus, the post Civil War Civil Rights Acts were resurrected. The leading case is *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which was decided after the passage of the Civil Rights Act of 1964.

After the Thirteenth Amendment abolished slavery in 1865, various States passed Black Codes designed to keep those who were newly enfranchised as second class citizens if citizens at all. Although such former slaves were now free, the objective was to keep them from exercising the legal rights usually associated with free citizenship such as the ownership of property and the making of contracts. See *Private Discrimination*, 74 Col. L.Rev. 450, 452 (1974). To counteract this movement, the Fourteenth and Fifteenth Amendments were eventually adopted. More immediately, however, the Civil Rights act of 1866 was passed. It was based upon § 2, the enforcement section, of the Thirteenth Amendment which, unlike the Fourteenth Amendment, did not require State action. What is now 42 USCA §§ 1981 and 1982 were section one of the Act of 1866. And there were misgivings as to the constitutionality of the Act. Simply, they were that the Thirteenth Amendment abolished slavery, and conduct, such as that prohibited by the 1866 Civil Rights Act, did not constitute the reestablishment of slavery in the strictest sense of the word. Because of the constitutional doubt just mentioned, the provisions of the Civil Rights Act of 1866 were reenacted, practically intact, in various statutes passed during the

1870's, after the effective date of the Fourteenth Amendment. Section One of the Act of 1866 was reenacted in 1870 and is now represented by 42 USCA §§ 1981 and 1982. Only the 1866, and not the 1870, Act is here pertinent because State action is clearly not involved in our case. The Acts of 1866 and 1870 were dormant for so many years that in civil law countries a desuetude would have occurred.[3] Not until after the passage of the Civil Rights Act of 1964 was the 1866 Act reactivated. The 1964 Act made no attempt to prevent racial discrimination in the admission policies of independent schools. If the Thirteenth Amendment authorized Congress to forbid independent schools to use race as an admissions criterion in 1866, it likewise did so in 1964. Whatever the intent of the 1866 Congress may have been, it must be that the 1964 Congress did not intend to restrict the admissions policies of independent schools.

The application of 42 USCA § 1981 to this case may be approached either as a matter of interpretation or as a matter of constitutionality: i.e., (1) what does § 1981 forbid? (2) is § 1981 constitutionally valid? Here, those two questions merge together. Section 1981, as any other statute, should be construed, in the light of constitutional limitations, to uphold its validity. See *Graham* v. *Richardson*, 403 U.S. 365, 382 (1971).[4]

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[3] Our dissent is not bottomed on this premise. See *Jones*, p. 437.

[4] Our result would be the same whether we construe § 1981 as being in conflict with the constitutional right of free association, or construe it consistent therewith. Of course a statute falls if in conflict with the Constitution. *The Federalists*, Nos. 16, 78, Hamilton; No. 44, Madison. In this connection, footnote 3 of the district court's opinion is curious (363 F.Supp. 1200 at 1204). That note states that although § 1981 forbids discrimination by whites against non-whites, it does not forbid discrimination by non-whites against whites or other non-whites. Such a construction would make the section clearly unconstitutional. Simply put, the opinion of the district court is that all races, so far as § 1981 is concerned, may operate racially segregated schools except the white race. Either all may do so (as we contend), or none may. Such a restrictive construction of § 1981 also goes against the plain language of the statute. The section provides: "*All* persons . . . shall have the *same* right . . . to make and enforce contracts . . . as is enjoyed by white citizens, and shall be *subject to like* [disabilities of various kinds] . . ." (emphasis added). To give non-whites greater rights than whites would run contra to the statute, the same as giving them less rights would violate it.

While dissenting, we wish to make it clear that we do not necessarily express approval of the alleged restrictive admissions policies of the appellants. What is involved here is a collision between competing social interests, any of which, standing alone, would be regarded with favor.

On the one hand, our society has an interest in the upward mobility of all of its citizens, unhampered by invidious distinctions. A corollary of this is an interest in educational opportunities.

This interest in educational opportunity as a means of upward mobility is confronted by social interests in the true independence of private educational institutions, and in the right of voluntary association and non-association. Although the backbone of our educational system must of necessity be found in our public schools, in a diverse society such as ours the leavening value of educational institutions which are autonomous and free from control by the federal and state governments is generally and legally accepted. Compare *Pierce* v. *Society of Sisters*, 268 US 510 (1925). Society has an interest in preserving the true independence of such institutions.

The other social interest which supports the position of appellants is the interest in free association. It is conceded that, as a general matter, enforced association is

foreign to our institutions. Mr. Justice Douglas, in his dissenting [5] opinion in *Moose* p. 179, the proposition thus:

> "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires."

Even were we to assume, for argument, the majority holding that the persuasiveness of the right of free association depends, in part at least, upon the size of the unit, both of the schools here involved are small. They are not huge and impersonal. The district court's opinion, 363 F.Supp. 1200, 1201, 1202, indicates a maximum enrollment at Fairfax-Brewster School of 236 and at Bobbe's School an average of 200. In schools of that size, intimacy of personal association is still important, and the right of free association certainly should apply, if it does in any case, to units of such numbers. How great a size, if any, might destroy the constitutional protection is a question not now before us.[6]

It is one of the missions of law to balance conflicting social interests so as to give the maximum of protection to

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[5] The force of Mr. Justice Douglas' statement is not reduced by the fact that it was part of a dissenting opinion; in fact, it is accentuated. The issue in the case was whether the fact that a private club dispensed liquor by virtue of a State license made its action State action. The majority thought not; Mr. Justice Douglas thought so. Thus, the quoted language was opposed to the main thrust of the opinion.

[6] The numbers involved in *NAACP* v. *Alabama* and *Gilmore* would seem to indicate that great numbers alone do not necessarily furnish sufficient cause to lose the constitutional protection of freedom of association.

each.[7] Which interest will prevail will depend therefore upon special considerations in each context in which the conflict is presented. A good illustration of this point is to be found in a comment upon the district court's decision in the instant cases in *Segregation in Private Schools*, 122 U. Penna. L. Rev. 471, at 478, 479 (1973). It is there stated that "a balancing of Constitutional interests is necessary to produce a proper construction of section 1981." The author continues:

> "Our discussion to this point suggests where the balance might be struck without seriously impairing either right. The right to contract protected in section 1981 should be limited to contracts found in secondary, as contrasted with primary relationships. The former [sic, latter] are 'basically relationships between friends,' characterized by 'intimate association.' Secondary relationships, by contrast, are 'impersonal, highly formalized relations between people,' for example, the relationship between buyer and seller . . . under this approach, discrimination would be allowed in primary relationships for any reason whatever, including racial bias, . . ."

The article suggests that such a differentiation reconciles the results in *Jones* v. *Alfred H. Mayer Co.*, 392 US 409 (1968), and *Moose Lodge No. 107* v. *Irvis*, 407 US 163 (1972). If this approach is used, it seems to us that a secondary school as found here involves a primary relationship and thus is not within the scope of § 1981.

So far as the balancing of conflicting interests is concerned, the difference between the right to own property, under § 1982, and the alleged right to attend an independent school under § 1981 becomes apparent. The word "right"

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[7] See Julius Stone, *Social Dimensions of Law and Justice* (Stanford University Press, 1966), Chapter 4, pages 164, et seq., citing Roscoe Pound and other legal scholars. Somewhat this same idea is suggested in 122 U. Penna. L.Rev. 471 at 478, 479 (1973), and 74 Col. L.Rev. 449, 468, 469 (1974).

is ambiguous. See *Private Discrimination*, 74 Col. L. Rev. 449, at 460, 469 (1974). It may mean an immunity from legal disability to own property or make a contract. In Hohfeldian terms, this would be a privilege. Or it may mean a power to compel another to convey property or enter into contractual relations notwithstanding a refusal to do so solely because of race. It is not necessary to assume that the word right means the same in all contexts. If on the one hand we consider society's interest in upward mobility and the removal of invidious discrimination against disadvantaged groups, it would seem clear, as pointed out in the Columbia Law Review citation, supra, that a mere freedom from legal disability to own property would be of little value to a black person if prospective vendors could refuse to sell to him because of his race. There might be no other source from which he could purchase property. Thus, the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*, 392 US 409 (1968), can be readily understood and accepted, even were we not under obligation to accept and follow it.

The same basis of necessity is not available to support the desire of blacks to attend an all white independent school. The overwhelming portion of the burden of educating our people is borne by public schools, which by law are non-segregated. If all schools, nursery through college, are considered, in 1972, 88.6% attended public schools and only 11.4% attended non-public schools. If only secondary schools, which is what are involved in this case, be considered, statistics show that in 1972 92.8% of students attended public schools and only 7.2% attended non-public schools. (American Almanac for 1974, page 338). These statistics are the more significant when it is considered that many independent schools, including all or practically all church affiliated institutions, do not use race as a basis for admission. Thus, as far as acceptance as a first class citizen is dependent upon educational opportunity, the impact of schools such as those operated by the two appel-

lants is diminutive. If it be asserted that the exclusionary policies of schools such as those appellants have invidious implications, it must be remembered that most, if not all, of the high prestige private schools, are not racially segregated. In fact, many of them make an affirmative effort to obtain black students. See *Segregated Academies and State Action* 82 Yale L. Jour. 1436, at 1444 (1973). Indeed, at the time of the district court's decision in this case, appellee Colin Gonzalez had been accepted by and was attending the Congressional School, a non-public school. 363 F. Supp. 1202. Insofar as society's interests in educational opportunity for all of its citizens and the removal of invidious discrimination are weighed against society's interests in true independence of non-public educational institutions and freedom of association, especially in connection with close, intimate relationships, we believe that, unlike the right to purchase property involved in *Jones v. Alfred H. Mayer Co.*, the balance is in favor of construing the right to make and enforce contracts protected by § 1981 as being a freedom from legal disability and not as being extended to prohibiting a non-public institution from operating on a racially segregated basis.

As we have previously indicated, we do not find it necessary to express an opinion on the constitutional validity of 42 USC § 1981, but we do feel compelled to say that the result reached by the majority is an unconstitutional and invalid application of the statute. Our conclusion is supported by the opinion of the court in *Gilmore v. City of Montgomery*, 417 US 556 (1974), which adopts, in the opinion of the court, the language we have previously quoted from the dissenting opinion of Mr. Justice Douglas in *Moose Lodge* to the effect that people may band together in their association with whomsoever they please. And those cases specifically refer to the forbidden and highly suspect classifications of race and religion. Nothing in history or the precedents contains any suggestion that the same reasoning applied to a religious school in *Pierce*, to

a social club in *Moose Lodge*, and indeed (albeit in slightly different context) to private schools in *Gilmore*, should not apply here. And we think the majority takes too little account of *Norwood v. Harrison*, for in that case, in a discussion of the precise type of segregated private school involved here, the court unequivocally stated that the very bias here charged is neither invalid nor subject to sanction of law:

> "Such private bias is not barred by the Constitution, nor does it invoke any sanction of law, but neither can it call on the Constitution for material aid from the State." 413 US 455, 469.

We would reverse the judgment of the district court on all points.

Supreme Court, U. S.
FILED
JAN 5 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Consolidated Nos. 75-62, 75-66, 75-278, 75-306

RUSSELL L. RUNYON, *et ux*, *Petitioners*,

v.

MICHAEL C. McCRARY, etc., et al.

FAIRFAX-BREWSTER SCHOOL, INC., *Petitioner*,

v.

COLIN M. GONZALES, etc., et al.

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION, *Petitioner*,

v.

MICHAEL C. McCRARY, etc., et al.

MICHAEL C. McCRARY, etc., et al., *Petitioners*,

v.

RUSSELL L. RUNYON, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI CASE NO. 75-62 FILED JULY 10, 1975
PETITION FOR CERTIORARI CASE NO. 75-66 FILED JULY 11, 1975
PETITION FOR CERTIORARI CASE NO. 75-278 FILED AUGUST 22, 1975
PETITION FOR CERTIORARI CASE NO. 75-306 FILED AUGUST 27, 1975
CERTIORARI AS TO ALL CASES GRANTED NOVEMBER 11, 1975

TABLE OF CONTENTS

Page

United States Court of Appeals for the Fourth Circuit – Case Nos. 73-2348, 73-2349, 73-2350, 73-2351, 73-2352

Relevant Docket Entries 1

Opinion of the Court 4

Judgment of the Court, Case No. 73-2348 35

Judgment of the Court, Case No. 73-2349 36

Judgment of the Court, Case No. 73-2350 37

Judgment of the Court, Case No. 73-2351 38

Judgment of the Court, Case No. 73-2352 39

Order Amending Opinion 40

Order Staying Mandate, Case Nos. 73-2351 and 73-2352 43

Order Staying Mandate, Case Nos. 73-2348 and 73-2349 . . . . . 44-A

Motion In Opposition for Allowance of Attorneys' Fees 45

United States District Court for the Eastern District of Virginia, Alexandria Division, Civil Action No. 494-72-A

Relevant Docket Entries 46-A

Complaint for Declaratory Judgment, Injunction and Damages 47

	Page
Answer to Complaint	53
Motion to Dismiss	55
Order Amending Answer	56
Order Denying Motion to Dismiss	58
Stipulation of Facts	59
Interrogatories (Excerpt)	61
Answers to Interrogatories (Excerpts)	62
Plaintiff's Exhibit No. 1	63
Plaintiffs' Exhibit No. 2	68
Plaintiffs' Exhibit No. 3	70
Plaintiffs' Exhibit No. __, Marked Plaintiffs' Exhibit No. 2	73
Plaintiffs' Exhibit No. __, Marked Plaintiffs' Exhibit No. 3	74
Defendants' Exhibit No. 1	75
Defendants' Exhibit No. 2	83
Defendants' Exhibit No. 3	84
Defendants' Exhibit No. 4	85
Defendants' Exhibit No. 5	88
Defendants' Exhibit No. 6	90

	Page
United States District Court for the Eastern District of Virginia, Alexandria Division, Civil Action No. 495-72-A	
Relevant Docket Entries	92
Complaint for Declaratory Judgment, Injunction and Damages	92-A
Motion to Dismiss and Answer to Complaint	99
Interrogatories to Plaintiffs' Gonzales	102
Interrogatories to Plaintiffs' McCrary	104
Motion to Quash	106
Interrogatories to Defendant Bobbe's School	107
Motion to Amend and Add as a Defense	110
Answers to Interrogatories to Defendant Bobbe's School	111
Answers to Interrogatories to Plaintiffs Gonzales	114
Answers to Interrogatories to Plaintiffs McCrary	116
Memorandum Opinion and Order Dismissing Claim for Damages of Plaintiffs Gonzales	119
Motion to Intervene as Party Defendant	121
Plaintiffs' Answer to Counterclaim	123
Answer of Intervenor	124
Order Granting Intervention of Southern Independent School Association	129

	Page
Stipulation	131
Order Compelling Production of Information and Amending the Court's Judgment	132
Supplement to Memorandum Opinion and Orders Dated July 27, 1973	132-A
Memorandum Opinion and Order, Civil Actions 494-72-A and 495-72-A	133
Plaintiffs' Exhibit No. 1	143
Plaintiffs' Exhibit No. 3	144
Intervenor's Exhibit No. 1	149
Intervenor's Exhibit No. 2	154
Intervenor's Exhibit No. 3	165
EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS	173
Witnesses:	
Margaret R. Gonzales	
Direct	175
Cross	194
Redirect	207
Raymond Gonzales	
Direct	210
Cross	214
Redirect	230-A
Marjorie Bryant	
Direct	221
Cross	224

	Page
Sandra McCrary	
Direct	226-B
Cross	231
Curtis L. McCrary	
Direct	233
Cross	236-A
Olga M. Reiss	
Direct	237
Cross	245
Robert S. Reiss	
Direct	246
Cross	248
Stewart A. Reiss	
Direct	249
Cross	253
William C. Gates	
Direct	257
Cross	262
Marshall Brookes (Rebuttal)	
Direct	263

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CASE NOS. 73-2348, 73-2349, 73-2350, 73-2351, 73-2352

Michael C. McCrary, infant by
Curtis L. McCrary and Sandra McCrary
and Colin M. Gonzales, infant by
Raymond Gonzales and Margaret R. Gonzales,

Appellees,

vs.

Russell L. Runyon,
Katheryne E. Runyon,

Defendants,

Southern Independent School
Association,

Appellant.

[Other titles omitted in printing]

RELEVANT DOCKET ENTRIES

1974		
Jan. 22		Order continuing case for argument en banc to the April 1974 Session filed
Jan. 28		Motion of the counsel for American Private Education, the National Association of Independent Schools, and the Southern Association of Independent Schools for leave to file brief
Apr. 2		Cause argued, en banc before Haynsworth, Chief Judge, Winter, Craven, Boitner, Russell, Field and Widener, Circuit Judges, and submitted.

1973

Apr. 11 Opinion (CJB) filed. BMB, WLW, JBC concur in parts I, II, III, and IV(a) and dissent in IV(b). DRB, HAP, HEW concur in part IV(C) and would reverse the district court on all points.

Apr. 11 Judgment of district court affirmed in part and reversed in part, judgment filed.

Apr. 20 Appellant's petition for rehearing filed.

May 1 Intervenor's opposition to motion for allowance of attorney's fees on appeal, filed

May 4 Motion of Russell Runyon in opposition for allowance of attorneys' fees' filed

May 4 Motion of the Fairfax-Brewster School, Inc. in opposition to the motion for allowance of attorney's fees' on appeal filed.

May 29 Order making modifications to the opinion of this court filed on April 11, 1973 and denying petitions for rehearing and denying motions for attorneys' fees filed.

June 26 Order granting recall and staying judgment pending application for writ of certiorari filed. pd.

June 27 Order granting recall and staying judgment pending application for writ of certiorari filed. pd.

Nov. 19 Certified copy of order of the Supreme Court granting certiorari November 11, 1973 filed.

Nov. 20 Certified record in two volumes and exhibits in one envelope transmitted to the Clerk of the Supreme Court.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-2348

Richard C. McCrary, infant by
Curtis L. McCrary and Sandra McCrary
and Colin M. Gonzales, infant by
Raymond Gonzales and Margaret R.
Gonzales,

Appellees,

versus

Ronald L. Runyon,
Katheryne E. Runyon

Defendants,

Southern Independent School
Association,

Appellant

No. 73-2349

Richard C. McCrary, infant by
Curtis L. McCrary and Sandra McCrary
and Colin M. Gonzales, infant by
Raymond Gonzales and Margaret R.
Gonzales,

Appellees,

versus

Ronald L. Runyon,
Katheryne E. Runyon,

Appellants,

Southern Independent School
Association,

Defendant.

No. 73-2350

Richard C. McCrary, infant by
Curtis L. McCrary and Sandra McCrary

Plaintiffs,

Colin M. Gonzales, infant by
Raymond Gonzales and Margaret R.
Gonzales

Appellees,

versus

Ronald L. Runyon
Katheryne E. Runyon

Southern Independent School
Association,

Appellees.

No. 73-2351

Colin M. Gonzales, infant by
his parents, Raymond Gonzales
and Margaret R. Gonzales,

Appellees,

versus

Fairfax-Brewster School, Inc.,

Appellant.

No. 73-2352

Colin M. Gonzales, infant by
his parents, Raymond Gonzales and
Margaret R. Gonzales,

Appellants,

versus

Fairfax-Brewster School, Inc.,

Appellee.

Argued April 2, 1974 Decided April 15, 1975

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge

Before Haynsworth, Chief Judge, and Winter, Craven, Butzner Russell, Field and Widener, Circuit Judges, sitting en banc.

George S. Leonard and Louis Koutoulakos for Appellants in Nos. 73-2348, 73-2349 and 73-2350; Andrew A. Lipscomb (Gary R. Sheehan and Tolbert, Lewis and Fitzgerald on brief) for Appellants/cross-Appellees in Nos. 73-2351 and 73-2352; (Thomas J. Schwab on brief for Amici Curiae in Nos. 73-2348, 73-2349 and 73-2351; Allison W. Brown, Jr., (Robert M. Alexander and Roderick V. O. Boggs on brief) for Appellees/cross-Appellants in Nos. 73-2348, 73-2349, 73-2350, 73-2351 and 73-2352.

HAYNSWORTH, Chief Judge:

The issue in this case is whether 42 U.S.C.A. §1981[1] prohibits private schools from denying admission to qualified black applicants solely on the basis of their race.

This appeal is a consolidation of two suits initiated by parents of black children who claim that they were denied admission to the appellant schools because of their race.

The Southern Independent School Association intervened in these actions, alleging that it is an association representing over 300 private, non-profit schools in the South, some of which concededly are racially exclusive in their admission policies. The position of the intervenor is simply that racial discrimination by private schools is not prohibited by §1981, and, in any event, cannot be constitutionally prohibited.

As found by the trial judge, in early May 1969, the parents of Colin Gonzales contacted the Fairfax-Brewster School, a private school located in Fairfax County, Virginia, about enrolling their son in the school's summer day camp program, and continuing into the first grade in the fall. The Gonzales' learned of Fairfax-Brewster through a mass mailing addressed to "Resident," an advertisement in the Yellow Pages in the telephone book, and from a friend whose son attended the Summer Camp.

[1]"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Thereafter, the Gonzales visited the school and, being pleased with what they saw, completed an application for their son. They also furnished, as required, a medical certificate and application fee. On May 16, 1969, the medical certificate and application fee were returned, accompanied by a form letter stating that the school was "unable to accommodate the applicaton." No further explanation was given.

Mr. Gonzales called the school and spoke with someone who identified himself as Captain Reiss. In response to Mr. Gonzales' inquiry as to why his son's application was rejected, he was told that the school was not integrated.

Captain Reiss is the Chairman of the Board of Fairfax-Brewster School. His son, Robert, is the Administrative Director, and his daughter-in-law Olga is the Registra

Both Captain Reiss and his son deny any such conversation. They testified that Colin, age 5-1/2, was rejected because they felt that the kindergarten he had previously attended gave Colin insufficient preparation for the first grade at Fairfax-Brewster. Because they found Colin unqualified for the first grade, the Reisses concluded that "there was no point" in allowing him to enter the summer camp only to have to "yank him out" at the beginning of the academic year.

Subsequent to their son's rejection from Fairfax-Brewster, the Gonzales telephoned Bobbe's School, and were told that only members of the Caucasian race were accepted.

In August 1972, Mrs. McCrary called Bobbe's School about enrolling her two year old son, Michael, in the nursery school. She asked whether the school was integrated and accepted blacks, and was told it did not. She did not file a formal application with Bobbe's.

Mr. Gates, the superintendent of Bobbe's, testified that he never received a call from either the Gonzales or Mrs. McCrary. He testified that the school does not discriminate on the basis of race, although he said that no black child had ever applied.

The district court found the testimony of the Reiss "unbelievable," and concluded that Colin had been rejected from Fairfax-Brewster because of his race. He further found that both the Gonzales and Mrs. McCrary had called Bobbe's and had been told that the school would not accept blacks. It held that, "[i]t is of no moment that no formal application was filed. It would be ridiculous to require this of the plaintiffs after they had effectively been told it was useless."

Accordingly, the court concluded that the appellant schools practiced racial discrimination in their admissions policies.

On the authority of *Jones v. Alfred H. Mayer Co.* 392 U.S. 409 (1968), *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) and *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973), it held that §1981 prohibits racial discrimination in private contractual arrangements, even when there is no state involvement. Therefore, it held that the schools were in violation of §1981 prohibits racial discrimination in private contractual arrangements, even where there is no state involvement. Therefore, it held that the schools were in violation of § 1981 in their admissions policies, and permanently enjoined defendants and intervenors from discriminating against blacks in enrollment in their schools. In addition, it awarded damages for embarrassment, humiliation and mental anguish to Colin, Michael and Michael's parents, and attorney's fees against Fairfax–Brewster and Bobbe's. *Gonzales v. Fairfax-Brewster School, Inc.*, 363 F. Supp. 1200 (E.D. Va. 1973).

Defendants and intervenor appeal. We affirm the injunction and the award of damages, but reverse the award of attorney's fees.

II.

Initially, the appellants contest the district court's findings of facts, urging that the district court was clearly erroneous in concluding that Fairfax-Brewster and Bobbe's practice racial discrimination.

There was conflicting testimony as to whether the Gonzales had been told that Fairfax-Brewster was not integrated and whether both the McCrarys and Gonzales were told that Bobbe's was not integrated. Resolution of this conflict depended upon the district court's evaluation of the credibility of the witnesses. We may not reverse a trier of fact, who had the advantage of hearing the testimony, on a question of credibility.

In addition, the testimony of the black parents was corroborated and supported by the testimony of two other witnesses. Mrs. Bryant testified that she had telephoned Fairfax-Brewster and Bobbe's to inquire about their admissions policies and was told that the schools were not integrated. Mr. Brooks, Mrs. McCrary's supervisor at her job, testified that a Mr. Gates, at Bobbe's, told him, over the telephone, that Bobbe's did not accept blacks.

The trial judge also thought that the Reim's story that Colin was rejected on educational rather than racial grounds was undercut by the fact that Fairfax-Brewster allows applicants to take an entrance examination when previous scholastic preparation is inadequate. Colin was not given this opportunity.

In short, there is ample evidence in the record to support the trial judge's factual determinations, and we are

unable to say that, viewing the record as a whole, he was clearly erroneous in concluding that Colin and Michael were denied admission to the schools because of their race.

III.

The substantive legal questions, which have been the subject of varied comment in the literature, [2] we think were correctly resolved by the district court. Section 1981 is a limitation upon private discrimination, and its enforcement in the context of this case is not a deprivation of any right of free association or of privacy of the defendants, of the intervenor, or of their pupils or patrons.

A.

It may once have been supposed that §1981 served only the limited office of removing legal disabilities which state statutes imposed upon black people. It, of course, did cancel state statutes which imposed restrictions upon the right of blacks to contract, but the Supreme Court has clearly held that it did much more than that. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229; *Tillman v. Wheaton-Haven Recreational Assn.*, 410

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[2] See Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449 (1974); Note Desegregation of Private Schools: Section 1981 as an Alternative to State Action, 62 Geo. L.J. 1363 (1974); Note, Segregation Academies and State Action, 82 Yale L.J. 1436 (1973); Comment, Jones v. Alfred H. Mayer Co. Extended to Private Education: Gonzales v. Fairfax-Brewster School, Inc., 122 U. Pa. L. Rev. 471 (1973); Recent Decisions, 45 Miss. L.J. 246 (1974); Recent Decisions, 8 U. Rich. L. Rev. 203 (1974); Recent Cases, 42 U. Cin. L. Rev. 767 (1973); Recent Cases, 26 Vand. L. Rev. 1307 (1973).

U.S. 431 (1973).

In *Jones v. Mayer*, the Court was concerned with the right to purchase real estate. There a real estate developer had refused to sell a residence in a "white area" to the black plaintiff. Analyzing the text and legislative history of §1 of the Civil Rights Act of 1866,[5] the court held that §1982 applied to purely private activity and provided a judicial remedy. As so construed, it was held that enactment of §1982 was a valid exercise of the power of Congress under the enforcement clause of the Thirteenth Amendment, which gave Congress power to "pass all laws necessary and proper for abolishing all badges and incidents of slavery."[6] The Court concluded that, unlike the Fourteenth Amendment, the Thirteenth reached private conduct in which no state action was involved.

As an intellectual exercise, the historical reading and interpretation of the majority in *Jones v. Mayer* may be debatable. *See* VI History of the Supreme Court of the United States; Fairman — Reconstruction and Reunion, 1207 et seq. That reading and interpretation was followed in *Sullivan v. Little Hunting Park* and in *Tillman v. Wheaton-Haven*, however, and, for us, is firmly established.

Jones v. Mayer, of course, dealt with §1982, assuring the right to purchase property. We deal with §1981, assuring the right to contract, but both sections derive from §1 of the Civil Rights Act of 1866. Both are subject to the same analysis and must be interpreted in the same light. In *Tillman v. Wheaton-Haven*, the claim of the guest and the host rested upon §1981. The Supreme Court expressly noticed the relation between §1981 and

[5] 14 Stats. 27

[6] Civil Rights Cases, 109 U.S. 3, 20 (1883).

§1982, their common derivation from §1 of the Civil Rights Act of 1866 and the necessity of according them similar interpretation.

It is contended here, however, that §1981 confers no right of action unless the contract denied the aggrieved person was open to all white people. It seems obvious that the relationship between the school on the one hand and a pupil and his parents on the other hand is a contractual one and that admission is a part of the process of forming such a contractual arrangement. It is also true that admission to the school is not open to all white people because there are academic, financial and other restrictions upon admission. Within the qualified class, however, there is no other limitation upon the admission of white applicants up to the school's capacity.

We may not read §1981 so restrictively as the schools would have us to do it. The school may not refuse with impunity to accept an otherwise qualified black applicant simply because it declines to admit unqualified white applicants. The section is violated by the school as long as the basis of exclusion is racial, for it is then clear that the black applicant is denied a contractual right which would have been granted to him if he had been white.

What we have said should not be read to call into question the right of the school to insist upon an even-handed requirement of academic and other racially neutral qualifications. Indeed, the right of the school to be selective on those bases is unquestioned here. All that is contended and all that we hold is that §1981 prohibits the rejection of a black applicant when his qualifications meet all other requirements and race is the only basis for his rejection.

8.

As applied here, we see no violation of any constitutionally protected rights of free association and of privacy.

There is a protected right of free association. As stated by the Supreme Court in *N.A.A.C.P. v. Alabama*, 357 U. S. 449 (1958), "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of * * * freedom of speech." *Id.* at 460. The constitutional protection, however, is essentially an attribute of First Amendment rights and would not ordinarily justify exclusion of others sharing the same beliefs and ideas. Here, at least, there is no showing that discontinuance of their discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.

Nothing in §1981 impedes parents in their exercise of a choice of a private school presenting ideas or having educational methods or practices which are not available in the public schools. They may do the same thing to avoid ideas and influences in the public schools which they regard as unhealthy. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Among private schools, they are free to prefer one with a certain curriculum or dogma over others, but the school, while it may exclude applicants on the basis of neutral principles, may not exclude on the basis of race.

There is also a right of privacy. Its constitutional basis may be elusive, but it has clearly been held to exist. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Though certain intimate and private affairs of men and women are protected from governmental interference, the the schoolhouse is far from the realm of protection. The

right is appropriately recognized in certain instances when only a few people are involved in activity unintended for the public view. In such instances, it is more than likely or inevitable that there is some plan or purpose of exclusiveness other than race. When relations between husband and wife are involved, their purpose to exclude all the rest of the world has no racial connotations. When a school holds itself open to the public, however, or even to those applicants meeting established qualifications, there is no perceived privacy of the sort that has been given constitutional protection.

Indeed, §1981 does not purport to reach all private associations. It reaches only those which evidence "no plan or purpose of exclusiveness" other than race. *Sullivan v. Little Hunting Park*, supra. Private associations having non-racial criteria for the selection of members may apply their criteria, even if it results in a disproportionate impact upon the members of one race. It is only when blacks are excluded because they are black, or denied a right to contract which would be granted were they white, that §1981 is violated.

Nor do we read anything in *Norwood v. Harrison*, 413 U.S. 455 (1973), as holding that rights of association or rights of privacy, or both combined, prevent the application of §1981 here. In *Norwood* the Supreme Court struck down a Mississippi statute giving free textbooks to all students, including those attending private, segregated schools. Mississippi contended that its failure to furnish free textbooks to students in private, segregated schools would violate the equal protection clause and would undermine the right of the parents to send their children to private schools. In answer, the Court observed that because "the Constitution may compel tolerance of private discrimination in some circumstances does not

made that a negative state support for such discrimination." 411 U.S. at 461.

The observation in *Norwood* is far from a holding that segregation in a private school is constitutionally protected. Earlier in the opinion the Court had observed that no such question was presented. 411 U.S. at 457. Nor do we rest with the question whether segregation in private schools is itself a violation of the Thirteenth or Fourteenth Amendment. We deal with a specific statute passed to implementation of the Thirteenth Amendment. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966); Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 78 Colum. L. Rev. 449 (1978).

Finally, the Court in *Norwood* recognized the threat of §1981 and §1982 when it noted that private decisions [illegible] have never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under §2 of the Thirteenth Amendment." 411 U.S. at 470. We deal with such circumstances. In short, we construe read *Norwood* as a holding that segregation in private schools such as these is constitutionally protected or so to be beyond the reach of §1981.

C.

Some schools may be so private as to have a discernible rule of exclusivity which is inoffensive to §1981. Should siblings continue to employ suits for their children, they may exclude the rest of the world, for the rule of exclusivity has the more distantly related and the unrelated regardless of race. The schools here are not private in that sense, and there is no discernible neutral rule of exclusivity which would bar these plaintiffs. The schools

are private only in the sense that they are managed by private persons and they are not direct recipients of public funds. Their actual and potential constituency, however, is more public than private. They appeal to the parents of all children in the area who can meet their academic and other admission requirements. This is clearly demonstrated in the case by the public advertisements. Within that constituency, they may not exclude a black applicant, solely because of his race, while accepting white applicants with comparable qualifications.

IV

The district court awarded damages for embarrassment, humiliation and mental anguish suffered plus an award of attorney's fees. The schools complain of both.

A.

It is not helpful to look to state decisions in personal injury tort cases to attach damages for such injuries are denied.[9] That damages are recoverable for violations of §§1981 and 1982 is established by *Sullivan v. Little Hunting Park*, 396 U.S. 229, 240, as which we are told, "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statute."

Section 1981 doctrine was intended to give to the former slave access to opportunities for material betterment of themselves, but it was also intended to restore

[9]*See the recent decision of the Virginia Supreme Court in Norfolk & Portsmouth* [illegible] (Va. December 8, 1978), it is arguable that the plaintiffs here could recover damages in a state tort action for emotional distress. For an earlier discussion of Virginia's requirement of a resulting physical injury in distress case, *see Hughes v. Moore*, 214 Va. 37, 197 S.E. 2d 214 (1973).

the stigma which accompanied the disabilities under which they formerly had labored. The plain command of the statutes is that those formerly enslaved henceforth shall be treated as having all of the rights and dignity of other people dwelling with them in a land of freedom. A denial of those statutory rights is treatment of the victim as being subject to those earlier disabilities. It is an affront, of which embarrassment and humiliation are natural consequences. If the statute is to be enforced fairly, if injuries suffered directly because of its violation are to be fairly compensated, damages for embarrassment and humiliation must be recoverable in a case such as this.

B.

The award of attorney's fees stands in a different posture. It is one thing to award damages for the invasion of a legal right and quite another to impose all of the litigation costs on the defendant. Unlike damages, attorney's fees have been granted only in narrowly defined circumstances.

We have recognized the propriety of an award of fees when a party maintained his position in bad faith, displaying "obstinate obduracy." *Brewer v. School Board of City of Norfolk*, 4 Cir., 456 F. 2d 943, 948-52. The district court, however, made no finding of "obstinate obduracy," [6] and we can see no basis for such a finding. Since this suit involves a novel application of a recently revived statute, the litigation of the issues cannot be equated with the recalcitrance we found in *Brewer*. Although at trial the parties recounted different versions of the facts and the court accepted the plaintiffs' story,

[6] In refusing punitive damages, the district court found that the defendants had not "acted recklessly or wilfully in disregard of clear existing law." 363 F. Supp at 1205 n.5.

the finding suggests no bad faith or perjury. Faults in perception or memory often account for differing trial testimony, but that has not yet been thought a sufficient ground to shift the expense of litigation.

Attorney's fees, of course, are available where Congress has expressly authorized them. A conspicuous example is Title II of the 1964 Civil Rights Act. [7] *Newman v. Pittie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Section 1981 never contained a provision for fees, and although the Emergency School Aid Act of 1972 expressly allows fees in suits to desegregate public or federally aided secondary or elementary schools, [8] plaintiffs have made no showing of federal aid to, or state action by, the defendants.

In the absence of expressed congressional direction, we are presented with the question whether to adopt a "private attorney general" theory. Although application of that theory may be proper in some actions based on the 1866 and 1870 Civil Rights Act, it would be inappropriate in this case. In considering an award of fees in an action based on the older civil rights statutes, we look to more recent congressional determinations that a policy is so important or public enforcement mechanisms are so ineffective that attorney's fees are necessary to promote private enforcement. Mere provision of a private cause of action is not sufficient. A statutory grant of attorney's fees in suits covering the same subject matter, however, would be a strong indication of such a congressional determination.

[7] 42 U.S.C. §2000a–3(b)

[8] 20 U.S.C. §1617 (allowing fees against a "local educational agency, a State . . . or the United States" for a violation of that Act, Title VI of the 1964 Civil Rights Act or the Fourteenth Amendment). *See* Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974); Northcross v. Board of Education of the Memphis City Schools, 412 U.S. 427 (1973).

In *Lee v. Southern Home Sites Corp.*, 5 Cir., 444 F. 2d 143, Judge Wisdom looked to the enactment of the Fair Housing Law of 1968, which contained a fees section, 42 U.S.C. §3612(c), in deciding that fees were available to a plaintiff seeking to redress racial discrimination in the sale of houses under §1982. In 1968 Congress had acted, pursuant to its powers under the Thirteenth Amendment, [9] to prohibit discrimination in the sale of private housing. [10] In Lees' §1982 action, he proceeded against precisely the discrimination that Congress had sought to curb by providing for an award of reasonable fees for his attorney to a prevailing plaintiff in a private enforcement action.

Employment discrimination suits provide another example of judicial allowance of fees under the older, more general civil rights statutes. We have recognized that a plaintiff under Title VII might recover attorney fees. [11] Reaching beyond Title VII, courts have allowed fees in actions brought under the older civil rights statutes to eliminate similar employment discrimination. *Fowler v. Schwarzwalder*, 8 Cir., 498 F. 2d 143, (§§1981, 1983); *Harper v. Mayor and City Council of Baltimore*, D. Md., 359 F. Supp. 1187, 1218-19, *modified on other grounds sub nom., Harper v. Kloster*, 4 Cir., 486 F. 2d 1134

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[9] United States v. Hunter, 4 Cir., 459 F. 2d 205, 214.

[10] After December 31, 1968 the Act applied to all dwellings, 42 U.S.C. §3603 (a)(2), except those enumerated in §3603(b). In *Lee* it was not clear whether the Act applied since the transactions occurred before December 31, 1968, and evidence on the applicability of §3603 (a)(1), which covered that time period, was not recounted in the opinion.

[11] 42 U.S.C. § 2000e–5(k); Lea v. Cone Mills Corp., 4 Cir., 438 F. 2d 86; Robinson v. Lorillard Corp., 4 Cir., 444 F. 2d 791

(§§1981, 1983); *Cooper v. Allen*, 5 Cir., 467 F. 2d 836 (§1981). In *Cooper* the plaintiff based his suit on racial discrimination in hiring by a municipal golf course, but he failed to go through the conciliation procedures of Title VII and could not proceed under the statute. Nevertheless, Congress had authorized fees in the similar Title VII action to encourage private elimination of such discrimination. Where plaintiffs advance precisely the same congressional goal by the use of a more general statute, they may be entitled to attorney's fees. That is not to say, however, that once fees are awarded in any §1981 or §1982 case, they should always be granted in actions based on those statutes. The focus of the inquiry should be whether the plaintiffs advanced a goal the attainment of which Congress sought to further by providing for the recovery by a prevailing plaintiff of his attorney's fees.

In this case the plaintiffs have not acted to foster a goal that Congress deemed so urgent. The Emergency School Aid Act spoke only to desegregation actions against public and federally aided schools. Unlike the Federal Housing Law or Titles II and VII of the 1964 Civil Rights Act, the statute does not aim to eliminate discrimination from a facet of private American life. The limitation in that statute to public schools is not merely a technical or procedural restriction, but goes rather to the substance of the congressional goal. Without some congressional direction, even by analogy, we will not

award attorney's fees, but will adhere to the usual rule that prevailing plaintiffs may not recover their attorney's fees,[12] for we find none of the recognized exceptions applicable.[13]

AFFIRMED IN PART .
REVERSED IN PART.

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[12] Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967).

[13] See Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

BUTZNER, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts I, II, III, and IV-A of the opinion. I dissent from Part IV-B, which reverses the district court's allowance of attorney's fees. I would adhere to our practice of sustaining a district judge who, for sound reasons, has allowed attorneys' fees. His discretion can be justified in this case on two grounds: the appellees acted as private attorneys general, and, alternatively, the appellants' defense was tainted by obdurate obstinacy.

By prosecuting this single case, the appellees invalidated the racially exclusive admission practices of over three hundred schools represented by the Southern Independent School Association, as well as the practices of Fairfax-Brewster and Bobbe Schools. In so doing, they vindicated congressional policy by abolishing an aspect of racial discrimination prohibited by the Civil Rights Act of 1866 [42 U.S.C. §1981]. This type of suit is encompassed by the private attorney general doctrine, which is applicable to suits brought under the Civil Rights Acts of 1866, 1871, and 1964. *See, e.g.*, Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); Cooper v. Allen, 467 F. 2d 836 (5th Cir. 1972); Lee v. Southern Home Sites Corp., 444 F 2d 143 (5th Cir. 1971); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., 3-judge court, *aff'd mem.*, 409 U.S. 942 (1972). Under this doctrine, the award is not dependent on proof of bad faith, for good or bad faith is irrelevant. Brandenburger v. Thompson, 494 F. 2d 885, 888 (9th Cir. 1974). Nor does the receipt of compensatory damages preclude an award of attorneys' fees, Knight v. Auciello, 453 F. 2d 852 (1st Cir. 1972), though, of course, a court may take damages into account when awarding a fee. *See* Lee v. Southern Home Sites Corp., 444 F. 2d at 147.

Judge Winter and Judge Craven concur in Parts I, II, III, and IV-A of the court's opinion. They join Judge Butzner in dissenting from Part IV-B.

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RUSSELL, FIELD, and WIDENER, Circuit Judges, concurring and *dissenting*:

I

We concur in the result reached in part IV-B of the opinion of the court. We would not, of course, reach the question of attorney's fees if our view on the merits prevailed. Otherwise, we respectfully dissent.

II

In its opening paragraph, the majority opinion correctly states the legal issue [1] in this case. We add, however, that the issue is presented to this court as one of first instance in any federal court at this or higher level. [2] We are bound by no definitive Supreme Court decision.

The majority regard *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), followed in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Tillman v. Wheaton-Haven Recreational Association*, 410 U.S. 431 (1973), as

[1] We are not convinced that the district court's findings of fact are not clearly erroneous. Such lawsuits, however, being largely unavailing, see *United States v. Johnston*, 268 US 220, 227 (1925), we address ourselves to the important legal issue here presented.

[2] In *Grier v. Specialized Skills, Inc.*, 326 F. Supp. 856 (W.D. N.C. 1971), the United States District Court for the Western District of North Carolina held the refusal of a barber school to admit black students constituted a violation of §1981. On the other hand, in *Riley v. Adirondack Southern School for Girls*, 368 F. Supp. 392 (C.D. Fla. 1974), the court refused to apply §1981 to a racially segregated independent school. The decision is base at least in part on factual determinations. See also *Segregation in Private Schools*, 122 U. of Penna. L. Rev. 471, at 475 (1973).

Alternatively, attorneys' fees are justified when defendants display obdurate obstinacy. *See* Brewer v. School Board of City of Norfolk, 456 F. 2d 943 (4th Cir. 1972) (dictum). The district court's findings, amply supported by the record, demonstrate that the officers of the schools did not truthfully recount under oath the facts of the case. Such bad faith in the conduct of litigation is a pernicious form of obstinacy that can no more be tolerated than out-of-court bad faith. *Cf.* Hall v. Cole, 412 U.S. 1, 15 (1973). This behavior should not be excused simply because this case involves a novel factual situation. *Cf.* Lea v. Cone Mills Corp., 438 F. 2d 86, 88 (4th Cir. 1971); Miller v. Amusement Enterprises, Inc., 426 F. 2d 534, 536 (5th Cir. 1970).

Finally, I believe that the enactment of 20 U.S.C. §1617 directing the allowance of fees in public school desegregation cases does not create an inference that Congress intended to withdraw from district courts "the inherent equitable power"* of a chancellor to allow fees in actions against private schools when the facts otherwise justify the award because the plaintiffs acted as private attorneys general or the defendants displayed obdurate obstinacy. Other courts confronted with analogous problems have not restricted the allowance of fees in suits brought under the earlier Civil Rights Acts to instances where Congress has subsequently authorized fees in related legislation. *See, e.g.*, Brandenburger v. Thompson, 494 F. 2d 885 (9th Cir. 1974)(welfare benefits); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., three-judge court), *aff'd mem.* 409 U.S. 942 (1972)(reapportionment). Indeed, the drastic limitation on the allowance of fees in civil rights cases suggested by the majority appears to be without precedent.

**See* Hall v. Cole, 412 U. S. 1, 5 (1973).

being controlling precedents. We do not so regard those decisions.

We believe that the majority has been unduly impressed by the historical relationship between §§1981 and 1982 and has failed to discern the difference between the right to purchase real estate and the right to attend an independent school inferred from the right to "make and enforce contracts." The purchase of real estate, with its attending perquisites, is a commercial transaction pure and simple, and many other contracts are likewise purely commercial. On the other hand, the relationship of teacher and student is one of status, which is related to the contract concept in the same way that the status of husband and wife may be said to grow out of a contract of marriage. The contract aspect of the situation is minor and incidental and serves no purpose other than as a door opener in the present case to bring independent schools within the scope of §1981. The right to make and enforce contracts does not imply a right to coerce an unwilling co-contractor into making any and every variety of contract.

The majority opinion also fails to recognize *Moose Lodge v. Irvis*, 407 U.S. 163 (1972), and *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974). True, those cases do not involve §1981 or §1982, but involve the problem of State action under the Fourteenth Amendment. However, they do show that answers to apparently the same type of technical questions in this field may vary according to the facts of each particular situation.

Legal problems arising out of a purpose to readjust interracial relationships fall into four categories: (1) those arising under the Fourteenth Amendment; (2) those created by the Civil Rights Acts of the 1960's; (3) those resulting from conditions imposed by the federal government upon benefits bestowed such as aids to education; and (4) those

arising from the enactment of the post Civil War Civil Rights Act of 1866 and the several acts of the 1870's, now found in 42 USCA §§1981, et seq. Legal problems involving the issues regarding the newly enfranchised slaves were acute until the *Civil Rights Cases*, 109 U.S. 3 (1883). Thereafter, such legal problems became stereotyped until the landmark decision in 1954 of *Brown v. Board of Education*, 347 U.S. 294 (1954). That case introduced the first of the above four categories, which is still paramount. Racially discriminatory action may be struck down under the Fourteenth Amendment provided State action is involved. In the 1960's, the Congress forbade racially discriminatory practices under the Civil Rights Acts of 1964 and 1968. Those acts did not touch private action in some fields. To cover this hiatus, the post Civil War Civil Rights Acts were resurrected. The leading case is *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which was decided after the passage of the Civil Rights Act of 1964.

After the Thirteenth Amendment abolished slavery in 1865, various States passed Black Codes designed to keep those who were newly enfranchised as second class citizens if citizens at all. Although such former slaves were now free, the objective was to keep them from exercising the legal rights usually associated with free citizenship such as the ownership of property and the making of contracts. See *Private Discrimination*, 74 Col. L.Rev. 450, 452 (1974). To counteract this movement, the Fourteenth and Fifteenth Amendments were eventually adopted. More immediately, however, the Civil Rights Act of 1866 was passed. It was based upon §2, the enforcement section, of the Thirteenth Amendment which, unlike the Fourteenth Amendment, did not require State action. What is now 42 USCA §§1981 and 1982 were section one of

the Act of 1866. And there were misgivings as to the constitutionality of the Act. Simply, they were that the Thirteenth Amendment abolished slavery, and conduct, such as that prohibited by the 1866 Civil Rights Act, did not constitute the reestablishment of slavery in the strictest sense of the word. Because of the constitutional doubt just mentioned, the provisions of the Civil Rights Act of 1866 were reenacted, practically intact, in various statutes passed during the 1870's, after the effective date of the Fourteenth Amendment. Section One of the Act of 1866 was reenacted in 1870 and is now represented by 42 USCA §§1981 and 1982. Only the 1866, and not the 1870, Act is here pertinent because State action is clearly not involved in our case. The Acts of 1866 and 1870 were dormant for so many years that in civil law countries a desuetude would have occurred. [3] Not until after the passage of the Civil Rights Act of 1964 was the 1866 Act reactivated. The 1964 Act made no attempt to prevent racial discrimination in the admission policies of independent schools. If the Thirteenth Amendment authorized Congress to forbid independent schools to use race as an admissions criterion in 1866, it likewise did so in 1964. Whatever the intent of the 1866 Congress may have been, it must be that the 1964 Congress did not intend to restrict the admissions policies of independent schools.

The application of 42 USCA §1981 to this case may be approached either as a matter of interpretation or as

[3]Our dissent is not buttressed on this premise. See *Jones*, p. 427.

a matter of constitutionality: i.e., (1) what does §1981 forbid? (2) is §1981 constitutionally valid? Here, these two questions merge together. Section 1981, as any other statute, should be construed, in the light of constitutional limitations, to uphold its validity. See *Graham v. Richardson*, 403 U.S. 365, 382 (1971). [4]

While dissenting, we wish to make it clear that we do not necessarily express approval of the alleged restrictive admissions policies of the appellants. What is involved here is a collision between competing social interests, any of which, standing alone, would be regarded with favor.

On the one hand, our society has an interest in the upward mobility of all of its citizens, unhampered by invidious distinctions. A corollary of this is an interest in educational opportunities.

This interest in educational opportunity as a means of upward mobility is confronted by social interests in the true independence of private educational institutions, and in the right of voluntary association and non-association. Although the backbone of our educational system must of necessity be found in our public schools, in a diverse society such as ours the burgeoning value of educational institutions which are autonomous and free from control by the federal and state governments is generally and legally accepted. Compare *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Society has an interest in preserving the true independence of such institutions.

[4]Our result would be the same whether we construe §1981 as being in conflict with the constitutional right of free association, or construe it consistent therewith. Of course a statute fails if in conflict with the Constitution. *The Federalist*, Nos. 10, 78, Hamilton; No. 44, Madison. In this connection, footnote 3 of the district court's opinion is curious (363 F. Supp. 1200 at 1204). That note states that although §1981 forbids discrimination by whites against non-whites, it does not forbid discrimination by non-whites against whites or other non-whites. Such a construction would make the section clearly unconstitutional. Simply put, the opinion of the

The other social interest which supports the position of appellants is the interest in free association. It is conceded that, as a general matter, enforced association is foreign to our institutions. Mr. Justice Douglas, in his dissenting [5] opinion in *Moose* p. 179, the proposition thus:

> "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires."

Even were we to assume, for argument, the majority holding that the persuasiveness of the right of free association depends, in part at least, upon the size of the unit, both of the schools here involved are small. They are not huge and impersonal. The district court's opinion, 363 F.Supp. 1200, 1201, 1202, indicates a maximum enrollment at Fairfax-Brewster School of 236 and at Bobbe's School an average of 200. In schools of that size, intimacy of

district court is that all races, so far as § 1981 is concerned, may operate racially segregated schools except the white race. Either all may do so (as we contend), or none may. Such a restrictive construction of § 1981 also goes against the plain language of the statute. The section provides: "*All* persons . . . shall have the *same* right . . . to make and enforce contracts . . . as is enjoyed by white citizens, and shall be *subject to like* [disabilities of various kinds] . . ." (emphasis added). To give non-whites greater rights than whites would run contra to the statute, the same as giving them less rights would violate it.

[5] The force of Mr. Justice Douglas's statement is not reduced by the fact that it was part of a dissenting opinion; in fact, it is accentuated. The issue in the case was whether the fact that a private club dispensed liquor by virtue of a State license made its action State action. The majority thought not; Mr. Justice Douglas thought so. Thus, the quoted language was opposed to the main thrust of the opinion.

personal association is still important, and the right of free association certainly should apply, if it does in any case, to units of such numbers. How great a size, if any, might destroy the constitutional protection is a question not now before us.[6]

It is one of the missions of law to balance conflicting social interests so as to give the maximum of protection to each. [7] Which interest will prevail will depend therefore upon special considerations in each context in which the conflict is presented. A good illustration of this point is to be found in a comment upon the district court's decision in the instant cases in *Segregation in Private Schools,* 122 U. Penna. L. Rev. 471, at 478, 479 (1973). It is there stated that "a balancing of Constitutional interests is necessary to produce a proper construction of section 1981." The author continues:

> "Our discussion to this point suggests where the balance might be struck without seriously impairing either right. The right to contract protected in section 1981 should be limited to contracts found in secondary, as contrasted with primary relationships. The former [sic, latter] are 'basically relationships between friends,' characterized by 'intimate association.' Secondary relationships, by contrast, are 'impersonal, highly formalized relations between people,' for example, the relationship between buyer and seller. . .

[6] The numbers involved in *NAACP v. Alabama* and *Gilmore* would seem to indicate that great numbers alone do not necessarily furnish sufficient cause to lose the constitutional protection of freedom of association.

[7] See Julius Stone, *Social Dimensions of Law and Justice* (Stanford University Press, 1966), Chapter 4, pages 164, et seq, citing Roscoe Pound and other legal scholars. Somewhat this same idea is suggested in 122 U. Penna. L.Rev. 471 at 478, 479 (1973), and 74 Col. L.Rev. 449, 468, 469 (1974).

under this approach, discrimination would be allowed in primary relationships for any reason whatever, including racial bias, . . ."

The article suggests that such a differentiation reconciles the results in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). If this approach is used, it seems to us that a secondary school as found here involves a primary relationship and thus is not within the scope of §1981.

So far as the balancing of conflicting interests is concerned, the difference between the right to own property, under §1982, and the alleged right to attend an independent school under §1981 becomes apparent. The word "right" is ambiguous. See *Private Discrimination*, 74 Col. L. Rev. 449, at 468, 469 (1974). It may mean an immunity from legal disability to own property or make a contract. In Hohfeldian terms, this would be a privilege. Or it may mean a power to compel another to convey property or enter into contractual relations notwithstanding a refusal to do so solely because of race. It is not necessary to assume that the word right means the same in all contexts. If on the one hand we consider society's interest in upward mobility and the removal of invidious discrimination against disadvantaged groups, it would seem clear, as pointed out in the Columbia Law Review citation, supra, that a mere freedom from legal disability to own property would be of little value to a black person if prospective vendors could refuse to sell to him because of his race. There might be no other source from which he could purchase property. Thus, the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), can be readily understood and accepted, even were we not under obligation to accept and follow it.

The same basis of necessity is not available to support the desire of blacks to attend an all white independent school. The overwhelming portion of the burden of

educating our people is borne by public schools, which by law are non-segregated. If all schools, nursery through college, are considered, in 1972, 86.6% attended public schools and only 13.4% attended non-public schools. If only secondary schools, which is what are involved in this case, be considered, statistics show that in 1972 92.4% of students attended public schools and only 7.6% attended non-public schools. (American Almanac for 1974, page 108). These statistics are the more significant when it is considered that more independent schools, including all or practically all church affiliated institutions, do not use race as a basis for admission. Thus, so far as acceptance as a first class citizen is dependent upon educational opportunity, the impact of schools such as those operated by the two appellants is diminutive. If it be asserted that the exclusionary policies of schools such as these appellants have invidious implications, it must be remembered that most, if not all, of the high prestige private schools, are not racially segregated. In fact, many of them make an affirmative effort to obtain black students. See *Segregated Academies and State Action*, 82 Yale L. Jour. 1436, at 1444 (1973). Indeed, at the time of the district court's decision in this case, appellee Colin Gonzales had been accepted by and was attending the Congressional School, a non-public school. 363 F. Supp. 1202. Insofar as society's interests in educational opportunity for all of its citizens and the removal of invidious discrimination are weighed against society's interests in true independence of non-public educational institutions and freedom of association, especially in connection with close, intimate relationships, we believe that, unlike the right to purchase property involved in *Jones v. Alfred H. Mayer Co.*, the balance is in favor of construing the right to make and enforce contracts protected by §1981 as being a freedom from legal disability and not as being extended to prohibiting a non-

public institution from operating on a racially segregated basis.

As we have previously indicated, we do not find it necessary to express an opinion on the constitutional validity of 42 U.S.C. §1981, but we do feel compelled to say that the result reached by the majority is an unconstitutional and invalid application of the statute. Our conclusion is supported by the opinion of the court in *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), which adopts, in the opinion of the court, the language we have previously quoted from the dissenting opinion of Mr. Justice Douglas in *Moose Lodge* to the effect that people may band together in their association with whomsoever they please. And those cases specifically refer to the forbidden and highly suspect classifications of race and religion. Nothing in history or the precedents contains any suggestion that the same reasoning applied to a religious school in *Pierce*, to a social club in *Moose Lodge*, and indeed (albeit in slightly different context) to private schools in *Gilmore*, should not apply here. And we think the majority takes too little account of *Norwood v. Harrison*, for in that case, in a discussion of the precise type of segregated private school involved here, the court unequivocally stated that the very bias here charged is neither invalid nor subject to sanction of law:

> "Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State." 413 US 455, 469.

We would reverse the judgment of the district court on all points.

[Filed April 15, 1975]

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2348

Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary and Colin M. Gonzales, infant by Raymond Gonzales and Margaret R. Gonzales)

Appellees,

vs.

Russell L. Runyon, Katheryne E. Runyon,)

Defendants,

Southern Independent School Association,)

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part and reversed in part.

/s/ WILLIAM K. SLATE, II

CLERK

[Filed April 15, 1975]

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-2349

Michael C. McCrary, infant by)
Curtis L. McCrary and Sandra McCrary)
and Colin M. Gonzales, infant by)
Raymond Gonzales and Margaret R. Gonzales)

Appellees,

vs.

Russell L. Runyon, Katheryne E. Runyon,)

Appellants,

Southern Independent School Association,)

Defendant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be and the same is hereby, affirmed in part and reversed in part.

/s/ WILLIAM K. SLATE, II

CLERK

[Filed April 15, 1975]

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-2350

Michael C. McCrary, infant by)
Curtis L. McCrary and Sandra McCrary,)

Plaintiffs,

Colin M. Gonzales, infant by)
Raymond Gonzales and)
Margaret R. Gonzales,)

Appellants,

vs.

Russell L. Runyon)
Katheryne E. Runyon,)

Southern Independent School)
Association,)

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part and reversed in part.

/s/ WILLIAM K. SLATE, II

CLERK

[Filed April 15, 1975]

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-2351

Colin M. Gonzales, infant by his parents, Raymond Gonzales and Margaret R. Gonzales,

Appellees,

vs.

Fairfax-Brewster School, Inc.,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part and reversed in part.

/s/ WILLIAM K. SLATE, II

CLERK

[Filed April 15, 1975]

JUDGEMENT

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-2352

Colin M. Gonzales, infant by his parents, Raymond Gonzales and Margaret R. Gonzales,

Appellants,

vs.

Fairfax-Brewster School, Inc.,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part and reversed in part.

/s/ WILLIAM K. SLATE, II

CLERK

[Filed May 29, 1975]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 73-2348
73-2349
73-2350

Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary and Colin M. Gonzales, infant by Raymond Gonzales and Margaret R. Gonzales,

Appellees,

versus

Russell L. Runyon, Katheryne E. Runyon,

Defendants,

Southern Independent School Association,

Appellant.

Nos. 73-2351
73-2352

Colin M. Gonzales, infant by his parents, Raymond Gonzales and Margaret R. Gonzales,

Appellees,

versus

Fairfax-Brewster School, Inc.,

Appellant.

ORDER

Upon consideration of the petitions for rehearing filed on behalf of the appellants and the appellees,

IT IS ORDERED that Section IV-A of the opinion be amended, adding at the end thereof a paragraph reading:

> While allowing damages in favor of the McCrarys against Bobbe's School and in favor of Colin Gonzales because of his minority, the district court denied an award of damages to Mr. and Mrs. Gonzales since it concluded that their claim was foreclosed by the applicable statute of limitations. The statute applied was the first sentence of Virginia Code §8-24, applicable to actions for personal injuries. It is contended on appeal that the judge should have applied Virginia's five year statute, the second sentence of §8-24, applicable to actions not otherwise provided for in more specific statutes of limitations. While the action is brought under Section 1981, the damage claim is entirely referable to injured feelings and humiliation. We have held such claims asserted under the Reconstruction Acts to be governed by Virginia's two year statute. *Allen v. Gifford,* 4th Cir. 462 F. 2d 615; see *Almond v. Kent,* 4th Cir., 459 F. 2d 200. It is also contended that the five year statute for actions on a contract, Virginia Code §8-13, applies, but it is clear that no action on a contract is involved.

IT IS FURTHER ORDERED that the petitions for rehearing be and each of them hereby is denied.

Upon consideration of the motion for allowance of attorney's fees on appeal filed on behalf of the appellees,

IT IS ORDERED that the motion for allowance of attorney's fees be and hereby is denied.

In conformity with Alyeska Pipeline Service Company v. Wilderness Society, 43 U.S.L.W. 4561 (U.S. May 12, 1975), Judge Butzner withdraws that part of his dissent approving the district court's allowance of attorneys' fees on the basis of the private attorneys general theory. However, he retains the section which would affirm the allowance of fees because of the defendants' bad faith. *See* Alyeska Pipeline Service Company v. Wilderness Society, *supra* 43 U.S.L.W. at 4567, 4570 n. 46. Judge Winter and Judge Craven concur in this amendment of Judge Butzner's dissent.

Except as modified herein, each member of the court adheres to the position he took in the previously released opinions.

FOR THE COURT

/s/ Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

May 26, 1975

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2351

[Filed June 25,1975]

Colin M. Gonzales, infant by his parents, Raymond Gonzales and Margaret R. Gonzales,

versus

Fairfax-Brewster School, Inc.,

Appellants,

No. 73-2352

Colin M. Gonzales, Infant by his parents, Raymond Gonzales and Margaret R. Gonzales

Appellants,

versus

Fairfax-Brewster School, Inc.,

Appellees.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert B. Bryan, Jr., District Judge.

Upon the motion of the appellant, by counsel and for cause shown,

IT IS ORDERED that the judgments in lieu of the mandates be, and same is hereby, recalled; that the Clerk of the United States District Court for the Eastern District of Virginia, at Alexandria, is directed to return to the Clerk of this Court the certified copy of the judgment in each case issued in lieu of the mandate and that the mandates be stayed pending application of the appellant

in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application is filed within the time permitted by law.

For the Court – by Direction.

/s/ WILLIAM K. SLATE, II

CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2348

[Filed June 24, 1975]

Michael C. McCrary, infant by
Curtis L. McCrary and Sandra McCrary
and Colin M. Gonzales, infant by
Raymond Gonzales and Margaret R.
Gonzales,

Appellees,

versus

Russell L. Runyon,
Katheryne E. Runyon,

Defendants,

Southern Independent School
Association,

Appellant.

No. 73-2349

Michael C. McCrary, infant by
Curtis L. McCrary and Sandra McCrary
and Colun M. Gonzales, infant by
Raymond Gonzales and Margaret R. Gonzales,

Appellees

versus

Russell L. Runyon,
Katheryne E. Runyon,

Appellants,

Southern Independent School
Association,

Defendant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Upon the motion of the appellant, by counsel and for good cause shown,

IT IS ORDERED that the judgment in lieu of the mandate be, and same is hereby, recalled; that the Clerk of the United States District Court for the Eastern District of Virginia, at Alexandria, is directed to return to the Clerk of this Court the certified copy of the judgment issued in lieu of the mandate and that the mandate be stayed pending application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application is filed within the time permitted by law.

For the Court - by Direction.

/s/ WILLIAM K. SLATE, II
CLERK

[Filed May 6, 1975]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MICHAEL C. McCRARY., etc., et al
Plaintiff–Appellees

v.

RUSSELL L. RUNYON, et al
Defendant–Appellants

No. 73-2348
No. 73-2349
No. 73-2350
No. 73-2351
No. 73-2352

and

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION
Intervenor

MOTION IN OPPOSITION FOR ALLOWANCE OF ATTORNEYS' FEES

Comes now the defendant-appellant, Russell L. Runyon, et al, d/b/a Bobbe's School, and moves this Honorable Court to deny the motion for allowance of attorneys' fees, and to further deny the petition for rehearing, filed on behalf of Gonzales, et al. It is submitted that as to these issues the trial court and the Court of Appeals were plainly right. It is further submitted that the petition for rehearing and for allowance of attorneys' fees were received by the undersigned counsel on May 2, 1975, inasmuch as he was out of his office on May 1, 1975, and therefore, he has insufficient time to prepare a brief by May 6, 1975.

Respectfully submitted

/s/

Louis Koutoulakos
2054 14th St. North
Arlington, Va. 22201
Attorney for Russell L. Runyon, et al, d/b/a Bobbe's School
Defendant–Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 1975, true copies of the foregoing and attached Motion in Opposition for Allowance of Attorneys' Fees were mailed to the following:

Allison W. Brown, Jr., Esq.
Suite 437-3000 Connecticut Ave.,N.W.
Washington, D.C. 20008

Robert M. Alexander, Esq.
2011 South Glebe Road
Arlington, Va. 22204

Andrew A. Lipscomb. Esq.
430 Washington Building
Washington, D. C. 20005

George S. Leonard, Esq.
1225 Connecticut Ave., N.W.
Washington, D. C. 20036

/s/

Louis Koutoulakos

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

COLIN M. GONZALES, infant,
by Raymond Gonzales and Margaret R. Gonzales)
his parents,)
6030 Vista Drive
Falls Church, Virginia 22041)

RAYMOND GONZALES and
MARGARET R. GONZALES,)

Plaintiffs,)

v.) **CIVIL ACTION NO. 494-72-A**

FAIRFAX-BREWSTER SCHOOL, INC.)
c/o Steuart A. Reiss
5860 Glen Forest Drive
Baileys Crossroads, Virginia 22041)

Defendant.)

RELEVANT DOCKET ENTRIES

1972

Dec. 19 Complaint, filed

1973

Feb. 13 Answer, filed
May 15 Motion to Dismiss, filed by deft.
May 15 Pre-trial. . . Case consolidated with C/A 495-72-A
July 11 Order amending defendant's Answer, ent. and filed
July 16, 17 Trial Proceedings: J. Bryan. This cause came on for trial by the Court. Interrogatories. . .

	admitted into evid. in both cases. Pltfs. adduced rebuttal evidence and rests. Deft's. adduced sur rebuttal evidence and rests. Closing arguments made. The Court took the cases under advisement
July 20	Defendant's Memorandum, filed
July 27	Memorandum Opinion and order granting judgment in favor of pltfs., entered-filed
July 30	Order, entered 7/16/73 dismissing claims of Raymond Gonzales & Margaret R. Gonzales for monetary damages & denying without prejudice deft's motion to dismiss, entered-filed

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[Filed December 19, 1972]

[Title omitted in printing]

COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION AND DAMAGES

1. Jurisdiction of this Court is invoked Pursuant to 28 U.S.C. Section 1337, 1343(4), 2201 and 2202. This action is brought pursuant to 42 U.S.C. Section 1981 and 42 U.S.C. Section 2000a to secure for plaintiffs, who are Negroes, the same right to make and enforce contracts as is enjoyed by white citizens, and to enforce the right of plaintiffs to the full and equal enjoyment of places of public accommodation without discrimination on the ground of race or color.

2. This is an action for a declaratory judgment as to plaintiffs' rights, an injunction and monetary damages, based on the maintenance by the defendant of a custom, policy and practice of discriminating on the basis of race or color with respect to the admission of children to educational and recreational facilities and programs operated by defendant.

3. Plaintiffs bring this action on their own behalf and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all similarly situated Negroes. Negro children as a class are barred or may be barred, because of their race or color, from admission to educational and recreational facilities and programs operated by defendant. The class represented by plaintiffs is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class; the claims of plaintiffs are typical of the claims of the class; and plaintiffs will fairly and adequately protect the interests of the class. Defendant has acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

4. Plaintiff Colin M. Gonzales, infant, brings this action through his parents, Raymond Gonzales and Margaret R. Gonzales, who also sue individually. Said plaintiffs are residents of Fairfax County, Virginia; they are members of the Negro or non-Caucasian race.

5. a. Defendant Fairfax-Brewster School, Inc. operates an establishment located in Fairfax County, Virginia, which provides nursery school, elmentary school, and summer camp facilities and programs for children.

b. In the course of operating said programs, defendant furnishes food for those who attend, which is consumed on defendant's premises. A substantial portion of said food originates outside of the State of Virginia and moves in interstate commerce.

c. Supplies and equipment used in the construction of defendant's facilities, and used in the course of its operations, have originated outside of Virginia and have moved in interstate commerce.

6. a. On or about June 15, 1969, plaintiff Colin M. Gonzales' parents, Raymond Gonzales and Margaret R. Gonzales, spoke to an agent or employee of defendant about enrolling Colin in defendant's elementary school program, and after learning that he met the qualifications for admission, Colin's parents informed said agent or employee that they would like to enroll him. When said agent or employee was told that Colin was of the Negro race, Colin's parents were informed that Colin was unacceptable for enrollment because of his race.

b. At all times since June 15, 1969, plaintiff Colin M. Gonzales has been prevented from attending Fairfax-Brewster School, because of defendant's custom, policy and practice of denying admission to children of the Negro or non-Caucasian race.

7. Defendant's failure and refusal to admit Negro or non-Caucasian children to educational and recreational facilities and programs operated by it is wilful, intentional, malicious, and in reckless disregard of the rights of plaintiffs guaranteed by the Civil Rights Act of 1866 (42 U.S.C. Section 1981) and the Civil Rights Act of 1964 (42 U.S.C. Section 2000a). Defendant's custom, policy and practice

of discriminating against persons of the Negro or non-Caucasian race deprives such persons of the same right to make and enforce contracts as is enjoyed by white citizens, and violates the right of such persons to the full and equal enjoyment of places of public accommodation without discrimination on the ground of race or color.

8. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for an injunction and a declaratory judgment is their only means of securing adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from defendant's acts and policy or practice of racial discrimination unless relief is provided by this Court.

9. As a direct and proximate result of the wrongful acts of defendant alleged herein, plaintiffs have suffered, and will continue to suffer, actual damages from (a) humiliation, embarrassment and mental and emotional suffering caused by the defendant's custom, policy and practice of racial discrimination; and (b) the deprivation by defendant of the statutory rights alleged in paragraph 7 above. Therefore,

Plaintiffs Colin M. Gonzales, Raymond Gonzales and Margaret R. Gonzales each claim actual and punitive or exemplary damages in the amount of $2000, or a total of $6000.

WHEREFORE, plaintiffs respectfully pray that this Court enter judgment for plaintiffs as follows:

1. Declaring that defendant's custom, policy and practice of discriminating on the basis of race or color with respect to the admission of children to educational and

recreational facilities and programs operated by defendant is violative of rights secured to plaintiffs and the class they represent under the provisions of 42 U.S.C. Section 1981, and 42 U.S.C. Section 2000a.

2. Granting plaintiffs and the class they represent a preliminary and permanent injunction enjoining defendant, its agents, employees and those acting in concert with it from discriminating on the basis of race or color with respect to the admission of children to educational and recreational facilities and programs operated by defendant.

3. Granting plaintiffs judgment against defendant, jointly and severally, for actual and punitive or exemplary damages in the amounts specified in paragraph 9 above.

4. Awarding plaintiffs their costs herein.

5. Awarding plaintiffs reasonable attorneys' fees.

6. Granting plaintiffs and the class they represent such further and additional relief as the Court may deem just and proper.

/s/ ALLISON W. BROWN, JR.
Allison W. Brown, Jr.
Suite 437
300 Connecticut Avenue, N.W.
Washington, D. C. 20008
202/254-9341

/s/ ROBERT M. ALEXANDER
Robert M. Alexander
2011 South Glebe Road
Arlington, Virginia 22204
703/920-7722

Attorney for Plaintiffs

Of Counsel:

Roderick V. O. Boggs
Washington Lawyers Committee for
Civil Rights Under Law
733–15th Street, N.W.
Washington, D. C. 20005

I, Raymond Gonzales, have read the foregoing complaint and have personal knowledge of the facts referred to therein. Said facts are true to the best of my knowledge and belief.

/s/ R. GONZALES

Subscribed and sworn to this

day Nov. 1972.

/s/
Notary Public

I, Margaret R. Gonzales, have read the foregoing complaint and have personal knowledge of the facts referred to therein. Said facts are true to the best of my knowledge and belief.

/s/ MARGARET R. GONZALES

Subscribed and sworn to this

15 day Dec. 1972.

/s/
Notary Public 5-22-73

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

[Title omitted in printing]

* * * * *

ANSWER TO COMPLAINT

[Filed February 13, 1973]

Comes now the Defendant and by way of Answer to the Complaint filed herein respectfully represents to this Court as follows:

!. The Complaint fails to state a cause of action upon which relief can be granted, and further the Statute of Limitations bars this action and/or laches bars the equitable relief sought herein.

2. The Defendant, through its appropriate agent, denies the jurisdiction of this Court is invoked under the Statutes cited under the facts in this case, and further denies the Defendant operates any place of public accommodation, but says rather it is a completely private educational institution.

3. The Defendant, through its appropriate agent, denies any of Plaintiffs' rights have been violated and denies they are entitled to the relief sought in Paragraph 2 of the Complaint, and further deny any custom, policy or practice of discrimination.

4. The Defendant, through its appropriate agent, denies the Plaintiffs have a standing to sue under Rule 23(b) (2) of the Federal Rules of Civil Procedure as alleged in Paragraph 3 of the Complaint, in view of the facts in this

case. The Defendant also denies the remaining allegations of Paragraph 3 of the Complaint.

5. The Defendant has no knowledge of the allegations alleged in Paragraph 4 of the Complaint and neither admits nor denies the truth thereof.

6. The Defendant admits the allegations of Paragraph 5(a) of the Complaint and says in addition thereto the Fairfax-Brewster School, Inc. is a completely private school offering no facilities for public accommodations.

7. The Defendant admits in answer to Paragraph 5 (b) that it furnishes food to its own students in a private dining hall for said students; the place or origin of such food is in many cases unknown to the Defendant and the Defendant's agents, but no such food is used outside the scope of its private operation.

8. The Defendant has no knowledge as to the truth of the allegations in Paragraph 5(c) but denies they have any application to the matter of this controversy.

9. The Defendant, through its appropriate agent, denies the allegations of Paragraphs 6 (a), 6(b), 7, 8 and 9 of the Complaint.

WHEREFORE, the premises considered, the Defendant prays the Complaint be dismissed with costs and reason-attorneys fees to the defendant.

Robert S. Reiss, President
Fairfax Brewster School, Inc.
Defendant

Wesley E. McDonald, Sr.
Attorney for Defendant
3675 Military Road
Arlington, Virginia

B. Austin Newton, Jr.
Attorney for Defendant
440 Maple Avenue East
Vienna, Virginia

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

[Title omitted in printing]

* * * * *

MOTION TO DISMISS

[Filed May 15, 1973]

Comes now the Defendant, Fairfax-Brewster School, Inc., through counsel, and moves this Honorable Court to dismiss this action for the following reasons:

1. The Court is without jurisdiction to hear this matter.

2. The allegations set out in the complaint are not actionable.

3. The Statute of Limitations has expired.

Wesley E. McDonald, Sr.
Attorney for Defendant
3675 Military Road
Arlington, Virginia

B. Austin Newton, Jr.
Attorney for Defendant
440 Maple Avenue East
Vienna, Virginia

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

[Title omitted in printing]

* * * * *

ORDER

[Filed July 11, 1973]

This cause came on to be heard on Defendant's motion at the time of the pre-trial herein for leave to amend its Answer, and it appearing that such leave should be granted, it is by the Court, this 11 day of July, 1973,

ORDERED that the Defendant's Answer be and the same hereby is amended to add the following paragraphs of defense:

"10. Defendant denies that admission to its private school for children, or to its summer camp for children, constitutes a contract within the meaning of 42 U.S.C. 1981.

11. Defendant says that if admission to its private school for children, or to its private summer camp for children, constitutes a contract within the meaning of 42 U.S.C. 1981, so as to give the infant plaintiff, or any other children, whether white, negro or of any other race, the right of compulsory admission thereto, then to such extent the statute is unconstitutional and (1) denies the rights of free speech and association guaranteed to the defendant, to the children attending defendant's private school, or private summer camp, and to their parents, under the First Amendment to the Constitution of the United States, (2) denies them the right of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, and (3) imposes involuntary servitude upon them in violation of the Thirteenth Amendment to the Constitution of the United States.

12. Defendant denies that it is engaged in or affects interstate commerce in the operation of either its private school for children or its private summer camp for children, or that defendant, by definition or policy intendment, comes within the terms of 42 U.S.C. 2000a.

/s/ ALBERT V. BRYAN, JR.
Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

ORDER

[Filed July 16, 1973]

THIS CAUSE came on to be heard upon the defendant's Motion to Dismiss this action, and it appearing to the Court that the claims of plaintiffs Raymond Gonzales and Margaret Gonzales for monetary damages are barred by Virginia's two-year statute of limitations applicable to personal injury actions, and that the requests for declaratory and injunctive relief, being based on alleged continuing wrongs, are not barred by said statute, it is by the Court this 16 day July, 1973,

ORDERED, ADJUDGED AND DECREED that the claims of Raymond Gonzales for monetary damages are dismissed; and it is further

ORDERED that defendant's Motion to Dismiss in all other respects is denied without prejudice.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

[Title omitted in printing]

* * * * *

STIPULATION OF FACTS

[Filed July 16, 1973]

1. Raymond and Margaret R. Gonzales are members of the Negro or non-Caucasian race.

2. Colin M. Gonzales is the son of Raymond and Margaret R. Gonzales.

3. Defendant, Fairfax-Brewster School, Inc. is located in Fairfax County, Virginia, where it operates a school comprised of pre-primary through sixth grade, as well as a summer camp.

* * * * *

7. Defendant's summer camp, which has operated since 1962, has never had a Negro child enrolled, to defendant's knowledge.

* * * * *

10. All of the students enrolled in the defendant's school are residents of Virginia.

11. The average total enrollment at defendant's school for the academic years 1955-1956 through 1972-1973 are as follows:

1955-56	21
1956-57	89
1957-58	94
1958-59	91
1959-60	118
1960-61	118
1961-62	138
1962-63	140
1963-64	141
1964-65	178
1956-66	194
1966-67	222
1967-68	231
1968-69	208
1969-70	177
1970-71	207
1971-72	193
1972-73	223

12. The average total enrollment at the summer camp for the years 1962 through 1972 are as follows:

1962	21
1963	31
1964	70
1965	79
1966	105
1967	125
1968	145
1969	174
1970	138
1971	165
1972	236

Attorney for Plaintiffs

Attorney for Defendant

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

[Title omitted in printing]

* * * * *

INTERROGATORIES

* * * * *

[Filed July 16, 1973]

The defendant is hereby requested to answer the following interrogatories, propounded by plaintiffs pursuant to Rule 33 of the Federal Rules of Civil Procedure, and to furnish plaintiffs with a copy of such answer within 30 days of the date of service hereof.

* * * * *

10. State the number of Negroes enrolled in Fairfax-Brewster School for each academic year from the time the school commenced operations through 1972-1973.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted in printing]

* * * * *

ANSWERS TO INTERROGATORIES

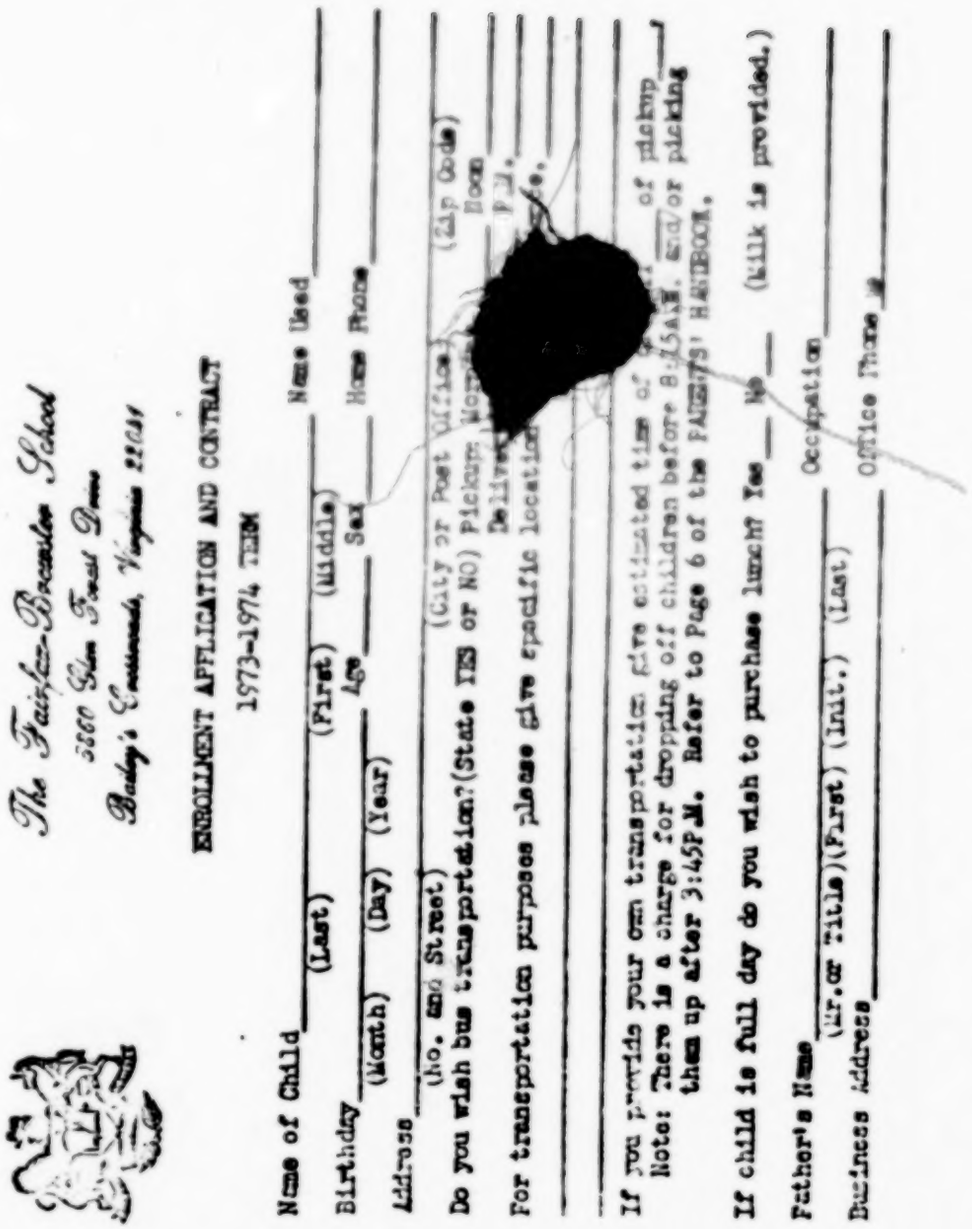
* * * * *

10. None, to our knowledge.

* * * * *

- - - - - - - - - - - -

Plaintiff's Exhibit No. 1
Filed July 16, 1973



The Fairfax-Brenzikofer School
3500 Old Lee Highway
Fairfax, Virginia 22030

ENROLLMENT APPLICATION AND CONTRACT
1973-1974 TERM

Name of Child _____ (Last) _____ (First) _____ (Middle) _____ Name Used _____
Birthday _____ (Month) (Day) (Year) Age _____ Sex _____ Home Phone _____
Address _____ (No. and Street) (City or Post Office) (Zip Code)
Do you wish bus transportation? (State YES or NO) Pickup: Home _____ Bldg. _____
For transportation purposes please give specific location. Delivery: Home _____ P.M.

If you provide your own transportation give estimated time of pickup _____
Note: There is a charge for dropping off children before 8:45AM. and/or picking them up after 3:45PM. Refer to Page 6 of the PARENTS' HANDBOOK.

If child is full day do you wish to purchase lunch? Yes ___ No ___ (Milk is provided.)

Father's Name _____ (Mr. or Title) (First) (Init.) (Last) Occupation _____ Office Phone # _____
Business Address _____

Mother's Name_____ Office Phone_____

Business Address_____ Occupation_____

Child's Physician_____ Office Phone_____

In the event the parent, guardian, or physician cannot be reached in case of emergency may we call our doctor? Yes____ No____

Previous School Attended_____ When_____

Number of Other Children in Family_____ Their Ages_____

Child's Religion_____ Special Talents_____

Disabilities_____

Will you permit your child to accompany his/her class on field trips scheduled for the 1973-1974 school year? Yes____ No____

How did you first learn of Fairfax-Brewster School?_____

PLEASE CHECK THE GENERAL GRADE OR LEVEL DESIRED:

		MORNING	FULL DAY					
Pre-Primary:	Nursery..	____	____	The Grades	One	____	Five	____
	Jr. Kind.	____	____		Two	____	Six	____
	Int. Kind.	____	____		Three	____		
	Sr. Kind.	____	____		Four	____		

(Please read and sign the contract on the back of this page.)

64

FOR OFFICE USE ONLY

Date of Interview_____ Visitors_____

Class Visited_____ Remarks_____

Date Issued_____ Envelope____ Par.Hdbk.____ Phys.____ PreSchHdbk.____ Other_____

Reg.FeePd._____ Acpt.Dt._____ Enr.List____ Card____ Folder_____

Last Name	First	Middle	Nickname	Birthdate	Age 9/1	Grade (AM,PM,FD)		Teacher
Parents' Names for Mailing Purposes						AM	Noon	PM
Street Address		Post Office		State	Zip Code	Lunch	Phy.Exam.Food,	
Home Phone	Exact Home Location					Newsletter	Number	

65

ENROLLMENT CONTRACT

Before an enrollment may be accepted a personal interview between the school office, the parent, and the child is required. The parent must complete the enrollment form and sign the contract on the reverse side. A $20.00 registration fee(not refundable) for new students must accompany this enrollment form. Old students must pay a $20.00 deposit (not refundable) which is deducted from the first tuition payment.

For students registering during the extremely busy period of August 20 through September 14 a late registration service charge of $10.00 is required. This charge is not refundable, nor is it applicable to any tuition payment.

Children are registered for the entire school year. Tuition, however, may be paid either on a monthly or a semester basis. The semester tuition plan is available only to students enrolled for the entire semester, and payment in full must be made by September 7 and February 1. Monthly tuition must be paid in full by the eighth day of each month, and the June payment, which is one-half of the regular monthly payment, is due by June 1. If tuition is not paid bythe due date a service charge of $5.00 is required. Payments not received by the 20th of the month will result in mandatory suspension.

In case of withdrawal two weeks written notice must be sent to the administrative office. If the child is withdrawn without notice two weeks tuition will be charged. The school will refund unused tuition starting two weeks from the date it is notified of withdrawal.

A physical examination form, signed by the child's physician, must accompany the enrollment forms of new students. The State of Virginia requires that this form be renewed each year for old students.

Fairfax-Brewster School reserves the right to accept or deny the application of any child for any reason whatsoever. If the application is denied the registration fee or deposit will be returned to the applicant.

I WISH TO ENROLL_____ IN FAIRFAX-BREWSTER SCHOOL IN ACCORDANCE WITH THE STIPULATIONS AND REQUIREMENTS STATED IN THIS APPLICATION. I HAVE RECEIVED A PARENTS' HANDBOOK FOR THE 1973-1974 YEAR, AND I AGREE TO COMPLY WITH THE POLICIES AND REGULATIONS STATED THEREIN.

Date_____ Signed_____

NOTE: A copy of this enrollment contract will be sent to parents along with a written notification of the child's acceptance.

TRANSPORTATION LOCATION FORM

Morning Pick-Up Address_____ Phone_____

Specific Location and Instructions_____

If specific pick-up time is required, for working parent, state time._____

Adult in charge of child if other than parent_____

Delivery: Noon____ PM____. Is delivery address same as above? If not, give address_____

Specific Locations and Instructions_____

If specific delivery time is required, please specify time. _____

Adult in charge of child if other than parent_____

Fairfax-Brewster School
5860 Glen Forest Drive
Bailey's Crossroads, Virginia 22041

PHYSICAL EXAMINATION FORM

Name of Child_____ Sex____Birthdate_____

Record of Illnesses (Give dates if possible):

Red Measles_____ Scarlet Fever_____ Frequent Throat Infections_____
German Measles_____ Rheumatic Fever_____ Frequent Ear Infections_____
Mumps_____ Convulsions_____ Other_____
Chicken Pox_____ Frequent Colds_____ _____

Dates of Immunizations:

Diptheria_____ D.P.T. Booster 1._____ 2._____ 3._____
Smallpox_____ TetanusBooster 1._____ 2._____ 3._____
Whooping Cough_____ Polio.....1._____ 2._____ 3._____, 4._____
Tetanus_____ Other_____

Physical Examination: Height_____ Weight_____ B.P._____

Vision: without glasses R_____ L_____ Hearing: R_____
with glasses R_____ L_____ L_____

Check Normal - Note Abnormalities:

General appearance_____ Bones_____ Thyroid_____
Skin and hair_____ Feet_____ Heart_____
Nose_____ Nutrition_____ Lungs_____
Oral Tissues_____ Chest_____ Ligaments_____
Throat_____ Abdomen_____ Muscles_____
Lymphnodes_____ Hernia_____

Statement of general physical condition_____

Conditions demanding special attention at school_____

_____

Date of Child's last visit to dentist _____

Physician's Name_____ Office Phone_____
(Please print.)

Physician's Signature_____ Date_____

MESSAGE TO PARENTS:

Before a child can be officially accepted by Fairfax-Brewster School, a physical examination form must be submitted to the office. This form is effective for one year from the date of the examination and must be renewed each year. Please have your physician fill out and sign this form. We will do all that we can to fulfill our part in following recommendations which your physician indicates above.

Fairfax-Brewster School
3860 Glen Forest Drive
Bailey's Crossroads, Virginia 22041

820-2680

ACCEPTANCE

_____
_____
_____

Fairfax-Brewster School is pleased to accept the enrollment of_____ as a_____day student for the 1973-1974 school term starting on_____. Tentative grade assignment (unless otherwise determined by the school) will be in_____. Your registration fee of $_____ was received on_____, 19__.

Cordially yours,
Olga M Reiss
Olga M. Reiss
Registrar

PARENT'S COPY OF ENROLLMENT CONTRACT

Before an enrollment may be accepted a personal interview between the school office, the parent, and the child is required. The parent must complete the enrollment form and sign the contract on the reverse side. A $20.00 registration fee(not refundable) for new students must accompany this enrollment form. Old students must pay a $20.00 deposit (not refundable) which is deducted from the first tuition payment.

For students registering during the extremely busy period of August 20 through September 14 a late registration service charge of $10.00 is required. This charge is not refundable, nor is it applicable to any tuition payment.

Children are registered for the entire school year. Tuition, however, may be paid either on a monthly or a semester basis. The semester tuition plan is available only to students enrolled for the entire semester, and payment in full must be made by September 7 and February 1. Monthly tuition must be paid in full by the eighth day of each month, and the June payment, which is one-half of the regular monthly payment, is due by June 1. If tuition is not paid by the due date a service charge of $5.00 is required. Payments not received by the 20th of the month will result in mandatory suspension.

There will be no cash rebate or refund of tuition for absence or exclusion for any reason whatsoever while a child is enrolled in Fairfax-Brewster School.

In case of withdrawal two weeks written notice must be sent to the administrative office. If the child is withdrawn without notice two weeks tuition will be charged. The school will refund unused tuition starting two weeks from the date it is notified of withdrawal.

A physical examination form, signed by the child's physician, must accompany the enrollment forms of new students. The State of Virginia requires that this form be renewed each year for old students.

Fairfax-Brewster School reserves the right to accept or deny the application of any child for any reason whatsoever. If the application is denied the registration fee or deposit will be returned to the applicant.

I WISH TO ENROLL _____ IN FAIRFAX-BREWSTER SCHOOL IN ACCORDANCE WITH THE STIPULATIONS AND REQUIREMENTS STATED IN THIS APPLICATION. I HAVE RECEIVED A PARENTS' HANDBOOK FOR THE 1973-1974 YEAR, AND I AGREE TO COMPLY WITH THE POLICIES AND REGULATIONS STATED THEREIN.

Date _____ Signed _____

PARENTS: Please keep this copy of the contract with your PARENTS' HANDBOOK.
Do not return it to us.

Plaintiffs' Exhibit No.
(Marked Plaintiffs' Exhibit No. 2)

[Filed July 16, 1973]

The Fairfax-Brewster School
5860 Glen Forest Drive
Bailey's Crossroads, Virginia 22041

DATE May 16, 1969

SUBJECT: Student Placement Application.

The school is, at this time, unable to accommodate the application

of Colin A. Gonzales

for Safari Summer Day Camp

[X] Your check submitted with form is hereby returned.
Also enclosed is the medical form which you so kindly had completed in advance.

[ ] No check submitted with form.

Sincerely yours,

[signature]
Registrar

Plaintiffs' Exhibit No.
(Marked Plaintiffs' Exhibit No. 3 by reporter)

YELLOW PAGES INDEX ON PAGE 5 SCHOOLS 809

FAIRFAX-BREWSTER

PRIVATE SCHOOL

NURSERY • KINDERGARTEN • GRADES 1 THROUGH 6

An investment in your child's future...

STAFF ★ CURRICULUM ★ FACILITIES ★ SERVICES

CLOSE SUPERVISION • THOROUGH TESTING & REPORTING • PHONETIC READING METHOD • FOREIGN LANGUAGE • ART, MUSIC • SPORTS PARK-LIKE GROUNDS • BEAUTIFUL WILLIAMSBURG BUILDINGS • DOOR-TO-DOOR BUS SERVICE • HOT LUNCHES • DRAMATICS • FIELD TRIPS

Comprehensive Pictorial Catalog Sent Upon Request

YEAR AROUND SERVICE
Open 7 A.M. to 6 P.M.

Safari Summer Day Camp | *Totem Lodge* Summer Program

820-2680

Near Historic Baileys X Roads

Defendants' Exhibit No. 1

[Filed July 16, 1973]

THE FAIRFAX-BREWSTER SCHOOL

The Fairfax-Brewster School was founded in 1954 as a private educational institution of exacting standards for the early education and social development of young boys and girls. The school offers instruction for children from grade one through grade six and maintains a separate school department for pre-primary instruction and specialized activities.

The school is situated on park-like grounds near the Bailey's Crossroads of Civil War historical note. On what is now the school site, Julia Ward Howe was inspired to write the immortal words to the Battle Hymn of the Republic as she watched the Army of the Potomac pass in review before Lincoln on November 20, 1861.

The school buildings are characterized by their graceful contemporary Williamsburg lines and general character. The classrooms are attractively decorated, furnished, and well lighted. Westcott Hall, the first annex to be constructed, provides additional classrooms and auditorium facilities for school plays, parents' meetings, and other uses.

The school campus is divided into several recreational areas to accommodate the various age and activity groups for both individual and organized sports.

The woodland groves, numerous evergreens, and flowering shrubs provide an interesting and beautiful setting for all school activities.

Educational Objectives

The major objectives of The Fairfax-Brewster School are to provide the child with a sound basic education, to develop in him desirable social attitudes, to encourage his natural curiosity, to stimulate his quest for knowledge, and to develop within him an understanding and appreciation of his American heritage.

The challenges of our era demand that we develop in our youth receptive and disciplined minds by establishing and maintaining worthy goals and by seeing to it that the child realizes their value and exerts uncommon effort to achieve them. Such effort can and should begin with the child's first school experiences.

The Fairfax-Brewster School seeks to fulfill its objectives by providing a school environment highly conducive to the mental growth of the child, and by affording him every opportunity to develop his talents and capabilities to the fullest.

Under the guidance of dedicated teachers and a school philosophy which encourages the pursuit of excellence and high ideals, the young student can acquire the essentials and take pride in his achievements.

The Elementary School

The elementary school, consisting of grades one through six, offers a combination of small classes, competent teaching, and individual attention which enables the child of normal or above ability to master the prescribed work of his grade by the end of the school year.

Proper work habits are established from the very beginning. The child is encouraged to do his best in all things,

to accept responsibility for his work, and to profit from his mistakes as well as his successes.

Curriculum

The curriculum utilizes textbooks of leading educational publishers which are nationally accepted and which meet the school's particular requirements. Selected supplementary materials, the school library reference books, educational movies and film strips, and related field trips enhance the courses of study.

Language Arts:

Reading – As reading is the most important element in the curriculum, careful attention is given to all the factors which bear on the child's ability to successfully cope with the emotional and physical experience of learning to read. Phonetic and sight methods are used to teach the fundamentals. As skill and independence develop, the second grade child becomes capable of absorbing library books in addition to his regular texts, and in the third grade he is taught to consult the dictionary and other reference materials. Throughout the grades the continuous reading program enables the child to build a substantial vocabulary, to read orally with clarity and expression, and to read silently with speed and comprehension. While teaching the child to become a proficient reader, the staff endeavors to cultivate in him an appreciation of the English language and a taste for good literature.

Writing – In first grade the child is taught manuscript printing. In the latter part of second grade printing is converted to cursive writing. Spelling, grammar, and punctuation, integral parts of the language program, are emphasized at all levels. Training in creative expression

through regular written compositions begins in second grade.

Speech – Oral recitation is an important phase of the language arts and is emphasized throughout the grades, with training in clarity, poise, and expression so that the child learns to communicate effectively.

Arithmetic

The study of numbers is a functional and rational endeavor which begins with the use of concrete materials, pictures, objects, etc., and systematically progresses to include abstract symbols and meanings. One concept leads to, builds upon, or enlarges another, and the processes are interrelated. The end objectives for all grades are: the understanding of numbers; the development of reasoning ability; the ability to solve problems related to everyday situations; and an understanding of the essential value of mathematical knowledge.

Geography and History

These very important subjects are introduced as formalized subjects in the third grade and increase in importance with each successive grade. Although taught as separate subjects their close relationship makes each more understandable and enjoyable. Preliminary to the introduction of geography and history is the teaching of social studies in first and second grades, covering units on the home, school, and community. An American Heritage Program, which compliments the study of American History, is designed to give the child an understanding and deep appreciation of his heritage–those great ideals and institutions upon which the American way of life is based–so that he can become oriented to it, protect it, and contribute to it.

Science

Science education is concerned with helping the growing child to understand his environment and to relate himself to it. The course of study is designed to provide a framework of concepts, built up through experiences, on which to base future learning. Science is given meaning and made practical through classroom projects, experiments, discussions, and nature study as adjuncts to the regular textbook subject matter.

Foreign Language

Conversational French is introduced in the first grade and is taught throughout the grades to those students who show an aptitude for it. Emphasis is placed mainly upon the oral aspect of the language. Through studies of French customs and life as compared with our own, students acquire a significant vocabulary and understanding of the language, as well as an enthusiasm which should continue in later school years.

Other Subjects

Physical education and health, music, drama, and arts and crafts complete the curriculum.

Testing and Evaluation

Each grade school student is given a mental maturity test to help indicate his intellectual potential and to ascertain his proper grade placement. Standardized achievement tests are administered at the end of each semester to measure the child's academic achievement in relation to national norms and school established standards. These tests aid in evaluating and re-orienting teaching in the light of the particular abilities and needs of the student.

Readiness tests are given to all senior kindergarten children at the end of the school year and to newly enrolled first grade pupils to help determine their readiness for first grade work.

Comprehensive report cards inform parents of their child's academic, emotional, social, and physical development in terms that are sensible and as complete as possible. There are four reporting periods during the school year.

A pupil will be promoted only if he has satisfactorily completed the required curriculum of his grade. Upon promotion he will be eligible for acceptance into any other school system.

The Pre-School

The pre-school period is one of adjustment from the sheltered home environment to the stimulus of daily contact with the outside world on equal childhood terms. The young child gains his independence and self-confidence through group and individual experiences in a friendly and stable atmosphere.

Fairfax-Brewster offers a carefully planned program designed to meet the needs and interests of the pre-school child and to prepare him for a successful beginning in the first grade–mentally, emotionally, socially, and physically.

Pre-school children of ages three and above are placed in appropriate classes according to age and maturity. All activities are geared to the needs and abilities of these children.

The Readiness Program – During the senior kindergarten year a formal readiness program is introduced. The reading readiness phase utilizes workbooks which help the child to acquire skills necessary for learning to read in first grade. The child is taught: left to right eye movements; the difference between left and right hand; coordination of eye and hand; how to develop visual and auditory discrimination, problematic thinking and memory; color perception; fundamental phonetics; and other important learning experiences. The numbers phase teaches the child to recognize the numbers from one to ten, to make them correctly, and to understand what each number means. At the end of the school year each child is given a standardized readiness test to ascertain his potential for first grade work.

Report cards are sent to parents for each of the four reporting periods. Parent-teacher conferences are encouraged when necessary and are arranged through the office.

Morning or full day classes are offered to all pre-school children. Afternoon classes are offered to senior kindergarten children.

Pre-school children who attend full day are provided cots for their afternoon rest periods. Additional supervised activities are offered in the afternoon.

Each pre-school child is requested to keep at school a painting smock, a small rest blanket, and a pair of overshoes. This equipment, as well as all other outer clothing and accessories, must be marked with the child's name.

Enrollment Procedures

Parents are invited to visit Fairfax-Brewster School and inspect its facilities. Appointments may be arranged by calling the office, HU 1-2680, Mondays through Fridays during school hours.

Prior to the acceptance of an enrollment a personal interview between the administrative office, the child, and his parent is necessary. New grade students will be accepted upon their qualifications as based upon previous records and the results of an entrance examination.

Parents will fill out an enrollment form and sign the contract. A formal acceptance will be forwarded to the parents.

A physical examination form, signed by the family physician, is required for each child.

The program includes:

Free play period
Social adjustment through playing and experimenting with specially selected equipment and materials.

Listening and learning period
Opening exercises, health inspection, pledge of allegiance, share and tell, discussions

Aesthetic activities
Songs, finger games, dramatizations, records, rhythm band, stories and poems

Snack time
Grace, then milk or juice and cookies, followed by a short rest

Work period
Cutting, pasting, painting, finger painting, pastel and crayon art, clay modeling, numbers games, reading and numbers readiness

Defendants' Exhibit No. 2
[Filed July 16, 1973]

THE FAIRFAX-BREWSTER SCHOOL
PARENTS' HANDBOOK
1969-1970 Year

ENROLLMENT PROCEDURES

Registration: Before an enrollment can be completed a personal interview between the administrative office, the parent, and the child is necessary. The parent must complete the enrollment form and sign the contract on the reverse side. A registration fee of $20.00 (not refundable) is required for new students which must accompany the enrollment form. Old students must pay a $20.00 deposit (not refundable) which is deducted from the first tuition payment. If an application is rejected the school will refund the registration fee.

* * * * *

Previous Records: Grade school applicants must submit report cards and all other pertinent records from the school previously attended.

Entrance Examinations: If previous scholastic records are inadequate or questionable entrance examinations will be given. The fees are $10.00 for a single session and $7.00 for each additional session, payable in advance.

* * * * *

Age Requirements: A senior kindergarten child should become five years old before January 1. A student is acceptable in first grade if his sixth birthday occurs by the end of the year. Mental, emotional and physical maturity, however, must be considered in proper grade placement. If a child cannot adjust to the work of his grade within six weeks the parent will be notified.

Defendant's Exhibit No. 3

[Filed July 16, 1973]

FIRST GRADE CLASS: 1969-70 Teacher: Mrs. Williams

STUDENT	PREVIOUS SCHOOLING (FB–Fairfax-Br. Senior Kind.)	%ile Rank as of 9/69*
Baier, Scott	FB	84
Bell, Theresa	FB	99
Brouillette, Kevin	United Church School, Canada	96
Chance, Courtney	FB	79
Cooper, Callie	FB	98
Duncan, Billy	FB	79
Ehrle, Richard	FB	98
Hyndman, Mark	FB	94
Johnson, Tim	Falls Church Episcopal Day School	81
Kildoo, Mike	FB	96
Lowenbach, Marc	FB	99
Madron, Lisa	FB	97
Martin, Mildred	Bobbye's Private School	97
Medell, George	FB	84
Morgan, Dorenda	FB	98
Morrissey, John	FB	81
Murphy, Scott	FB	99
O'Bannon, Ricky	FB	77
Porter, Tommy	Three Bears Kindergarten	86
Singleton, Wendy	FB	99
Sitter, Debbie	FB	95
Shay, John	FB	94
Smith, Cherie	FB	93
Shafer, Charles	FB	65
Yocum, Charles	Merrilinga Kindergarten, Australia	63

*Based on Metropolitan Readiness Test, Form B, given Sept. 1969.

This class opened in September, 1969, with 25 students. It closed in June with 21. The average for the year was 22 1/2 students.

Only five children in the class were new students, and all five had received kindergarten training the previous year.

READINESS STATUS OF CLASS IN TERMS OF PERCENTILE RANK

(as of 9/69)

Old students	90 %ile
New students	84 1/2 %ile
Entire class	89 %ile

Defendant's Exhibit No. 4

[Filed July 16, 1973]

FAIRFAX-BREWSTER SCHOOL

Early-Late Care

This service is available to children of working parents who provide their own transportation to and/or from school. It is offered before and after regular school hours between 7 A.M. and 6 P.M.

Home-School Relations

An open house is held each year to acquaint parents with their child's teacher and the school. Newsletters and bulletins keep parents informed of important and interesting school issues and events. Programs and other special events are offered from time to time to stimulate home-school relations.

Report Cards

Report cards are issued four times during the school year. These cards indicate to parents as objectively as possible the

intellectual, social and physical development of the child. Close supervision and evaluation of the daily progress of each child is maintained, and any difficulties experienced are promptly brought to the attention of the parents. No child will be promoted to the next grade without having satisfactorily fulfilled the requirements of his grade.

Year Around Service

By providing early-late services, a summer camp program, and vacation day care (by special arrangement) Fairfax-Brewster School endeavors to meet the needs of parents the year around.

Admissions Policy

The admittance of any child to Fairfax-Brewster School is based on the following:

The child must be of average or above intelligence and have an achievement potential in keeping with the class he seeks to enter. He must be emotionally, socially, and physically acceptable.

As the one abiding objective of the school is to educate young children, the Admittance Committee will not pass favorably upon any applicant unless assured that his presence in Fairfax-Brewster will be in the best interests of himself, his respective classmates, and the school in general.

Specific enrollment procedures and detailed information on all aspects of the school are found in the Parents' Handbook.

Robert S. Reiss, Director

SAFARI SUMMER DAY CAMP

Fairfax-Brewster is the originator of **Safari** Summer Day Camp. **Safari** excites and holds the interest of children because it combines the best elements of the typical day camp with the adventurous concept of the safari.

Safari campers are transported in colorful "safari-kars" which are painted to resemble the skins of various African animals. Safaris are taken to places up to fifty miles from school headquarters. While our purpose is to give each young explorer a "shot at big game fun" it is not all traveling and exploring. Woven into the program throughout the summer are top rated camp activities; swimming with instruction; selected sports; arts and crafts; overnight camp-outs; and much more.

Safari is the culmination of the school's desire to create a recreational program in which children have more fun and learn more during their summer vacation.

The **Junior** "edition" of the summer camp program provides the pre-school child with a safe, happy and constructive summer. Activities are designed to appeal specifically to the interests of the young child vacationer and include: aquatic play, games, arts and crafts, nature study, care of the school pets, pony rides, picnics, and occasional "junior safaris" to nearby places. Activities are conducted primarily in our pre-school building and adjacent playgrounds, and they are under the direction of members of our Pre-Primary Department. The Junior Program is an ideal way to introduce the very young child to a school environment.

Safari Program: for children to enter Grades 1-6 (ages 5 3/4–11)

Junior Program: for pre-school children, ages 2 1/2–5 1/2

Defendant's Exhibit No. 5

[Filed July 16, 1973]

NON CAUCASIANS IN ATTENDANCE
9/67–6/73

1967-68

David, Pacita	Philippines
Tran, Phuong Lan	Siamese
Khan, Hakin	Indian
Kundu, Marina	Indian
Kundu, Apurba	Indian

1968-69

Kundu, Apurba	Indian
Kundu, Marina	Indian
Bennett, Dawn	Oriental
Kawakami, Wataru	Oriental
Kim, Chris	Oriental
Surti, Devesh	Asian

1969-70

Torii, Hiromi	Japanese
Bennett, Dawn	Oriental
Bennett, April	Oriental

1970-71

Estberg, May Lee	Oriental
Estberg, Timothy	Oriental
Kim, Kathy	Oriental
Tabuko, Sonoka	Japanese
Torii, Hiromi	Japanese
Wong, Douglas	Chinese
Nakhleh, William	Asiatic

1971-72

Amirshahi, Arya	Persian
Diab, Nirvana	Oriental
Lee, Sang Yong	Chinese
Massoud, Sayed	Arabic
Naito, Mikio	Japanese
Rizvi, Kamal	Asian
Rizvi, Mariam	Asian
Shoji, Hiroyuki	Japanese
Wong, Douglas	Chinese
Choi, Hee Suk	Chinese
Murakami, Yuki	Japanese
Singh, Alka	Indian
Torii, Hiromi	Japanese
Nakhleh, William	Asiatic

1972-73

Amirshahi, Arya	Persian
Kikura, Seri	Japanese
Massoud, Sayed	Arabic
Murakami, Shinichiro	Japanese
Naito, Mikio	Japanese
Naito, Ryoji	Japanese
Rizvi, Kamal	Asian
Rizvi, Mariam	Asian
Shoji, Hiroyuki	Japanese
Singh, Alka	Indian

Enrollments:		n.c	% of total
1967-68	–231	5	2%
1968-69	–208	6	3%
1969-70	–177	3	1%
1970-71	–207	7	3 1/2%
1971-72	–193	4	2%
1972-73	–223	10	5%

Defendant's Exhibit No. 6

[Filed July 16, 1973]

COURSES OF STUDY

Senior Kindergarten

* Weather: precipitation, evaporation, condensation, wind, clouds, temperature, seasons, day and night

* Measurement: clocks, calendars, yardsticks, scales, thermometer

* Our Country, Our Flag, Our State; animals and plants in our State

Seeds: how they grow, their needs, how they travel

Money

Magnetism

Color: light and shadow

Holiday Celebrations: study of Christmas in Spain or other country compared to U.S. Christmas

* Reading and Phonics Readiness (with workbook and worksheets)

* Numbers Readiness (with workbook and worksheets)

Current Events (with Weekly Reader Surprise Newspapers)

---

*Emphasized

First Grade

* Reading: 3 pre-primers and workbook
Primer and workbook

1st reader and workbook
2 or more supplementary readers (at least one at second grade level)

* Phonics: 3 phonetic reading-workbooks

* Language: written language workbook
spelling workbook

* Penmanship: workbook

* Mathematics: Grade 1 workbook

Science: textbook

Social Studies: textbook and Weekly Reader Newspaper

French: conversational

---

*Emphasized

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MICHAEL C. McCRARY, infant,
by Curtis L. McCrary and Sandra McCrary)
his parents,
6062 Belleview Drive
Falls Church, Virginia 22041

COLIN M. GONZALES, infant,
by Raymond Gonzales and Margaret R.
Gonzales,
his parents,
6030 Vista Drive
Falls Church, Virginia 22041

CURTIS L. McCRARY, SANDRA McCRARY)
RAYMOND GONZALES and MARGARET
R. GONZALES,

Plaintiffs,

vs.

RUSSELL L. RUNYON and KATHERYNE
E. RUNYON
D/B/A BOBBE'S PRIVATE SCHOOL
820 S. Carlin Spring Road
Arlington, Virginia 22204

Defendants.

Civil Action
No. 495-72-A

RELEVANT DOCKET ENTRIES

1972

Dec. 19	Complaint, filed

1973

Feb. 15	Motion to dismiss and answer
Mar. 15	Amended answer

Apr. 16	Memorandum Opinion and Order by Judge Albert V. Bryan, Jr. dismissing claims for damages of Raymond and Margaret R. Gonzales
June 15	Motion to intervene, answer to complaint and counterclaim, filed
July 9	Motion to intervene, granted
June 19	Answer to coonterclaim
June 21	Answer and counterclaim of Intervenor filed
July 13	Stipulation filed
July 16 & July 17	Trial proceedings before Judge Bryan
July 27	Memorandum Opinion and Order by Judge Bryan granting relief to plaintiffs and enjoining defendants and intervenors
Sep. 14	Amendment entered to Court's order of July 27, 1973
Sep. 24	Amendment entered to Court's order of July 27, 1973

[Filed Dec. 19, 1972]

[Title omitted in printing]

COMPLAINT
FOR DECLARATORY JUDGMENT,
INJUNCTION AND DAMAGES

1. Jurisdiction of this Court is invoked Pursuant to 28 U.S.C. Section 1337, 1343(4), 2201 and 2202. This action is brought pursuant to 42 U.S.C. Section 1981 and 42 U.S.C. Section 2000a to secure for plaintiffs,

who are Negroes, the same right to make and enforce contracts as is enjoyed by white citizens, and to enforce the right of plaintiffs to the full and equal enjoyment of places of public accommodation without discrimination on the ground of race or color.

2. This is an action for a declaratory judgment as to plaintiffs' rights, an injunction and monetary damages, based on the maintenance by the defendants of a custom, policy and practice of discriminating on the basis of race or color with respect to the admission of children to educational and recreational facilities and programs operated by defendants.

3. Plaintiffs bring this action on their own behalf and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all similarly situated Negro citizens. Negro children as a class are barred or may be barred, because of their race or color, from admission to educational and recreational facilities and programs operated by defendants. The class represented by plaintiffs is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class; the claims of plaintiffs are typical of the claims of the class; and plaintiffs will fairly and adequately protect the interests of the class. Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

4. a. Plaintiff Michael C. McCrary, infant, bring this action through his parents, Curtis L. McCrary and Sandra McCrary, who also sue individually. Said plaintiffs are residents of Fairfax County, Virginia; they are members of the Negro or non-Caucasian race.

b. Plaintiff Colin M. Gonzales, infant, brings this action through his parents, Raymond Gonzales and Margaret R. Gonzales, who also sue individually. Said plaintiffs are residents of Fairfax County, Virginia; they are members of the Negro or non-Caucasian race.

5. a. Defendants Russell L. Runyon and Katheryne E. Runyon operate Bobbe's Private School, an establishment located in Arlington County, Virginia, which provides nursery school, elementary school, and summer camp facilities and programs for children.

b. In the course of operating said programs, defendants furnish food for those who attend, which is consumed on defendants' premises. A substantial portion of said food originates outside of the State of Virginia and moves in interstate commerce.

c. Supplies and equipment used in the construction of Bobbe's Private School facilities, and used in the course of its operations, have originated outside of Virginia and have moved in interstate commerce.

6. a. On or about August 7, 1972, Plaintiff Michael C. McCrary's mother, plaintiff Sandra McCrary, spoke to an agent or employee of Bobbe's Private School about enrolling Michael in its nursery school program and after learning that he met the qualifications for admission, she informed said agent or employee that she would like to enroll him. When Sandra McCrary informed said agent or employee that Michael was of the Negro race, she was informed that he was unacceptable for enrollment because of his race.

b. At all times since August 7, 1972, plaintiff Michael C. McCrary has been prevented from attending

Bobbe's Private School, because of defendants' custom, policy and practice of denying admission to children of the Negro or non-Caucasian race.

7. a. On or about June 15, 1969, plaintiff Colin M. Gonzales' parents, spoke to an agent or employee of Bobbe's Private School about enrolling Colin in its elementary school program, and after learning that he met the qualifications for admission, Colin's parents informed said agent or employee that they would like to enroll him. When said agent or employee was told that Colin was of the Negro race, Colin's parents were informed that Colin was unacceptable for enrollment because of his race.

b. At all times since June 15, 1969, plaintiff Colin M. Gonzales has been prevented from attending Bobbe's Private School, because of defendants' custom, policy and practice of denying admission of children of the Negro or non-Caucasian race.

8. Defendants' failure and refusal to admit Negro or non-Caucasian children to educational and recreational facilities and programs operated by them is wilful, intentional, malicious, and in reckless disregard of the rights of plaintiffs guaranteed b, the Civil Rights Act of 1866 (42 U.S.C. Section 1981) and the Civil Rights Act of 1964 (42 U.S.C. Section 2000a). Defendants' custom, policy and practice of discriminating against persons of the Negro or non-Caucasian race deprives such persons of the same right to make and enforce contracts as is enjoyed by white citizens, and violates the right of such persons to the full and equal enjoyment of places of public accommodation without discrimination on the ground of race or color.

9. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for an injunction and a declaratory judgment is their only means of securing adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from defendants' acts and policy or practice of racial discrimination unless relief is provided by this Court.

10. As a direct and proximate result of the wrongful acts of defendants alleged herein, plaintiffs have suffered, and will continue to suffer, actual damages from (a) humiliation, embarrassment and mental and emotional suffering caused by the defendants' custom, policy and practice of racial discrimination; and (b) the deprivation by defendants of the statutory rights alleged in paragraph 8 above. Therefore,

Plaintiffs Michael C. McCrary, Curtis L. McCrary and Sandra McCrary each claim actual and punitive or exemplary damages in the amount of $2000, or a total of $6000.

Plaintiffs Colin M. Gonzales, Raymond Gonzales and Margaret Gonzales each claim actual and punitive or exemplary damages in the amount of $2000, or a total of $6000.

WHEREFORE, plaintiffs respectfully pray that this Court enter judgment for plaintiffs as follows:

1. Declaring that defendants' custom, policy and practice of discriminating on the basis of race or color with respect to the admission of children to educational and recreational facilities and programs operated by defendants is violative of rights secured to plaintiffs and the

class they represent under the provisions of 42 U.S.C. Section 1981, and 42 U.S.C. Section 2000a.

2. Granting plaintiffs and the class they represent a preliminary and permanent injunction enjoining defendants, their agents, employees and those acting in concert with them from discriminating on the basis of race or color with respect to the admission of children to educational and recreational facilities and programs operated by defendants.

3. Granting plaintiffs judgment against defendants, jointly and severally, for actual and punitive or exemplary damages in the amounts specified in paragraph 10.

4. Awarding plaintiffs their costs herein.

5. Awarding plaintiffs reasonable attorneys' fees.

6. Granting plaintiffs and the class they represent such further and additional relief as the Court may deem just and proper.

/s/ ALLISON W. BROWN, JR.
Allison W. Brown, Jr.
Suite 437
300 Connecticut Avenue, NW
Washington, D.C. 20008
202/254-9341

/s/ROBERT M. ALEXANDER
Robert M. Alexander
2011 South Glebe Road
Arlington, Virginia 22204
703/920-7722

Attorney for Plaintiffs

Of Counsel:

Roderick V.O. Boggs
Washington Lawyers Committee for
Civil Rights Under Law
733 15th Street, N.W.
Washington, D.C. 20005

I, Curtis L. McCrary, have read the foregoing complaint and have personal knowledge of the facts referred to therein. Said facts are true to the best of my knowledge and belief.

/s/Curtis L. McCrary

S.S. in County of Arlington
State of Virginia
Subscribed and sworn to this
8 day of November 1972.

/s/Dorothy V. Bogusky
Notary Public

I, Sandra McCrary, have read the foregoing complaint and have personal knowledge of the facts referred to therein. Said facts are true to the best of my knowledge and belief.

/s/Sandra McCrary

Subscribed and sworn to this
9th day of November 1972.
/s/Paul J. Bates
Notary Public

My Commission Expires April 28, 1973

I, Raymond Gonzales, have read the foregoing complaint and have personal knowledge of the facts referred to the

to therein. Said facts are true to the best of my knowledge and belief.

/s/Raymond Gonzales

Subscribed and sworn this 16
day of November 1972.

/s/John P. Young, Jr.
Notary Public

I, Margaret R. Gonzales, have read the foregoing complaint and have personal knowledge of the facts referred to therein. Said facts are true to the best of my knowledge and belief.

/s/Margaret R. Gonzales

Subscribed and sworn to this
15 day December 1972

/s/Stanley Ryan
Notary Public

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

* * * * *

[Filed 2/15/73]

Come now the defendants, Russell L. Runyon and Katheryne E. Runyon, d/b/a Bobbe's Private School, and respond to the complaint filed against them as follows:

MOTION TO DISMISS

This Court has no jurisdiction in this cause.

ANSWER

FIRST DEFENSE

No cause of action stated upon which any relief may be granted.

SECOND DEFENSE

Defendants do not operate a place of public accommodation. This is a private institution. There is no infringement upon any civil or constitutional rights.

THIRD DEFENSE

This is not a proper class action, as alleged in paragraph 3. Not all are similarly situated and may have adverse interests.

FOURTH DEFENSE

Defendants are without sufficient knowledge as to the allegations in paragraphs 4.a. and 4.b., and demand strict proof thereof.

Defendants are without sufficient knowledge as to the allegations in paragraphs 6.a. and 6.b., and demand strict proof thereof.

Defendants are without sufficient knowledge as to the allegations in paragraph 7.a. and 7.b., and demand strict proof thereof.

FIFTH DEFENSE

Defendants admit operating a private institution.

Defendants deny that interstate commerce is involved.

Deny that plaintiffs are entitled to any relief asked for, deny the allegations in paragraphs 8, 9 and 10.

WHEREFORE, defendants pray that this matter be dismissed with costs to defendants.

Respectfully submitted,

RUSSELL L. RUNYON
KATHERYNE E. RUNYON
D/B/A BOBBE'S PRIVATE SCHOOL
Defendants
By /s/
Counsel for Defendants

VAROUTSOS, KOUTOULAKOS,
ARTHUR AND HILTON
By /s/LOUIS KOUTOULAKOS
Counsel for Defendants
2054 14th Street North
Arlington, Va. 22201
527-0124

CERTIFICATE OF SERVICE

I hereby certify that on this 18 day of February, 1973, true copies hereof were mailed, postage prepaid, to Allison W. Brown, Jr., Esq., Suite 437, 300 Connecticut Avenue, N.W., Washington, D.C. 20008, and Robert M. Alexander, Esq., 2011 South Glebe Road, Arlington, Va. 22204, Attorneys for plaintiffs.

/s/LOUIS KOUTOULAKOS
Louis Koutoulakos
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

* * * * *

[Filed 3/12/73]

INTERROGATORIES

TO: Robert M. Alexander, Esq.
2011 South Glebe Road
Arlington, Va. 22204, and
Allison W. Brown, Jr., Esq.
Suite 437, 3000 Connecticut Ave., N.W.
Washington, D.C.

Attorneys for Plaintiffs

The plaintiffs, Raymond Gonzales and Margaret R. Gonzales, are requested to answer the following interrogatories propounded by defendants pursuant to Rule 33 of the Federal Rules of Civil Procedure, and to furnish defendants with a copy of such answer within 30 days from date of service hereof:

1. Please state which of the parents of Colin Gonzales it was who allegedly spoke to an agent or employee of Bobbe's Private School.

2. State whether or not one or both parents of Colin Gonzales participated in speaking allegedly to an agent or employee of Bobbe's Private School.

3. State the approximate time on June 15, 1969.

4. State the name or names of the employee or employees or agent or agents who were spoken to.

5. State whether or not any application for admission

was filed.

6. State whether or not an application for admission was given to either or both of the parents of Colin Gonzales.

7. State whether or not Colin Gonzales was enrolled in any school, and if so, when and what school, together with the address of same.

8. State whether or not Colin Gonzales is of the Negro race; if not, of what race.

RUSSELL L. RUNYON and
KATHERYNE E. RUNYON,
d/b/a BOBBE'S PRIVATE SCHOOL,
Defendants

By
Louis Koutoulakos
Counsel for Defendants

VAROUTSOS, KOUTOULAKOS,
ARTHUR AND HILTON

By
Counsel for Defendants
2054 14th Street North
Arlington, Va. 22201

CERTIFICATE OF SERVICE

I hereby certify that on this day of March, 1973, a true copy hereof was mailed to each attorney for the plaintiffs, Robert M. Alexander, Esq., 2011 South Glebe Road, Arlington, Va. 22204, and Allison W. Brown, Jr., Esq., Suite 437, 3000 Connecticut Avenue, N.W., Washington, D.C. 20008.

Louis Koutoulakos

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

* * * * *

[Filed 3/12/73]

INTERROGATORIES

TO: Robert M. Alexander, Esq.
2011 South Glebe Road
Arlington, Va. 22204, and
Allison W. Brown, Jr., Esq.
Suite 437, 3000 Connecticut Ave., N.W.
Washington, D.C. 20008

Attorneys for Plaintiffs

The plaintiffs, Curtis L. McCrary and Sandra McCrary, are requested to answer the following interrogatories propounded by defendants pursuant to Rule 33 of the Federal Rules of Civil Procedure, and to furnish defendants with a copy of such answer within 30 days from date of service hereof:

1. Please state the name of the agent or employee of Bobbe's Private School who allegedly was talked to about enrolling Michael McCrary.

2. Please state the time of day this was, morning, afternoon or evening.

3. State what the specific conversation was.

4. State what steps were taken, other than alleged in paragraph 6.a. of the complaint, regarding any enrollment.

5. State whether or not there were any attempts to enroll in any other school in the Metropolitan Area.

6. State whether or not Michael McCrary is enrolled in any other school, and if so, name and address of school, and date of enrollment.

7. State whether or not Curtis McCrary and/or Sandra McCrary did anything at all with reference to attempting to enroll Michael McCrary. If so, please enumerate the steps that were taken; whether or not any enrollment application was actually filled out and submitted; and if so, when.

8. Give the names and addresses of all similarly situated Negro citizens in whose behalf this action is being brought, and state the date or dates that this class as set out retained the attorneys for this suit.

RUSSELL L. RUNYON and
KATHERYNE E. RUNYON,
d/b/a BOBBE'S PRIVATE
SCHOOL,
Defendants

By
Louis Koutoulakos
Counsel for Defendants

VAROUTSOS, KOUTOULAKOS,
ARTHUR AND HILTON

By
Counsel for Defendants
2054 14th Street North
Arlington, Virginia 22201
527-0124

CERTIFICATE OF SERVICE

I hereby certify that on this day of March, 1973, a true copy hereof was mailed to each attorney for the plaintiffs,

Robert M. Alexander, Esq., 2011 South Glebe Road, Arlington, Va. 22204, and Allison W. Brown, Jr., Esq., Suite 437, 3000 Connecticut Avenue, N.W., Washington, D.C. 20008.

Louis Koutoulakos

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[Title omitted in printing]

* * * * *

MOTION TO QUASH

Come now the defendants, by counsel, and move this Honorable Court to quash the interrogatories herein filed, and also the request to produce, on the following grounds:

1. That this Court does not have jurisdiction in case.

2. That this matter involves a private institution, and there is no legitimate civil rights issue.

/s/Louis Koutoulakos
Louis Koutoulakos
Counsel for Defendants
2054 14th Street North
Arlington, Va. 22201
527-0124

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

[Title omitted in printing]

* * * * *

INTERROGATORIES

* * * * *

Counsel for Defendants

The defendants are herby requested to answer the following interrogatories, propounded by plaintiffs pursuant to Rule 33 of the Federal Rules of Civil Procedure, and to furnish plaintiffs with a copy of such answer within 30 days of the date of service hereof.

* * * * *

a. State all changes in this data which occurred through calendar 1972.

* * * * *

3. Describe with particularity the summer camp program operated by Bobbe's Private School.

4. Describe with particularity the physical facilities occupied by Bobbe's Private School and its summer camp, stating, among other things, the amounts of land, and size of buildings, including the number of rooms.

5. State the number and kind of motor vehicles owned or operated by Bobbe's Private School in connection with its school and summer camp program.

6. State when Bobbe's Private School commenced operations.

7. State when the Bobbe's Private School summer camp commenced operations.

8. State the average total enrollment of Bobbe's Private School for each academic year from the time the school commenced operations through 1972-1973.

9. State the average total enrollment of the summer camp operated by Bobbe's Private School for each year from the time the camp commenced operations through 1972.

10. State the number of Negroes enrolled in Bobbe's Private School for each academic year from the time the school commenced operations through 1972-1973.

11. State the name and last known address of each individual counted in the answer to Interrogatory 10.

12. State the number of Negroes enrolled in the summer camp operated by Bobbe's Private School for each year from the time the camp commenced operations through 1972.

13. State the name and last known address of each individual counted in the answer to Interrogatory 12.

14. State the current tuition charges for Bobbe's Private School.

15. State the current charges for attendance at the summer camp operated by Bobbe's Private School.

* * * * *

/s/ ROBERT M. ALEXANDER
Robert M. Alexander
2011 South Glebe Road
Arlington, Virginia 22204

Allison W. Brown, Jr.
Suite 437
3000 Connecticut Avenue, N.W.
Washington, D. C 20008

Attorneys for Plaintiffs

Of Counsel

Roderick V. O. Boggs
Washington Lawyers Committee for
Civil Rights Under Law
733–15th Street, N.W.
Washington, D. C. 20005

CERTIFICATE OF SERVICE

I hereby certify that on this *8th* day of March, 1973, copies of the foregoing Interrogatories were mailed, first class, postage prepaid to Louis Koutoulakos, Esq., 2054 14th Street North, Arlington, Virginia 22201, attorney for defendants.

/s/ ALLISON W. BROWN, JR.
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

[Title omitted in printing]

* * * * *

MOTION TO AMEND AND ADD AS A DEFENSE

[Filed March 15, 1973]

Come now the defendants and move this Honorable Court to amend and add as a defense to their grounds of defense, with reference to plaintiffs Colin M. Gonzales, Raymond Gonzales and Margaret R. Gonzales, as follows:

1. That their action is barred by the statute of limitations and/or laches.

RUSSELL L. RUNYON and
KATHERYNE E. RUNYON, d/b/a
BOBBE'S PRIVATE SCHOOL

By /s/ LOUIS KOUTOULAKOS
Counsel for Defendants

VAROUTSOS, KOUTOULAKOS,
ARTHUR AND HILTON

By /s/ _____

Counsel for Defendants
2054-14th Street North
Arlington, Va. 22201
527-0124

CERTIFICATE OF SERVICE

I hereby certify that on this day of March, 1973, true copies hereof were mailed to Robert M. Alexander, Esq., 2011 South Glebe Road, Arlington, Va. 22204, and Allison W. Brown, Jr., Esq., Suite 437, 3000 Connecticut Ave., N.W., Washington, D. C. 20008.

/s/ LOUIS KOUTOULAKOS

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

[Title omitted in printing]

* * * * *

ANSWERS TO INTERROGATORIES

[Filed April 11, 1973]

The defendants, Russell L. Runyon and Katheryn E. Runyon, d/b/a Bobbe's Private School, submit the following answers under oath to interrogatories propounded by plaintiffs:

* * * * *

3. A summer day camp operated during July and August for four year olds through ten year olds, offering horseback riding, archery, swimming, fishing, boating, hiking, cook-outs, and arts and crafts.

4. School land size: 31,000 square feet.
School building: 9,698 square feet (1 building with 15 rooms).
Camp land: 84 acres.
Camp buildings: 2,061 square feet (2 buildings with 7 rooms).

5. One 60 passenger school bus; one 2 ton truck; and 2 1/2 ton trucks.

6. 1958.

7. 1967.

8. 1958 - 5
1959 - 40
1960 through 1965 - 85
1966 through 1972 - 200

9. 1967 through 1972 - 100

10. None.

11. Not applicable.

12. None.

13. Not applicable.

14. From $27.00 weekly to $35.00 weekly.

15. $90.00 additional for summer to regular tuition.

* * * * *

- - - - - - - - - - - - -

/s/ RUSSELL L. RUNYON
Russell L. Runyon

/s/ KATHERYNE E. RUNYON
Katheryne E. Runyon
D/B/A Bobbe's Private School
Defendants

STATE OF VIRGINIA
COUNTY OF ARLINGTON, to-wit:

Subscribed and sworn to before me, the undersigned Notary Public in and for the County and State aforesaid, this *10th* day of April, 1973. My commission expires *April 5, 1976.*

/s/ MARY F. HARDING
Notary Public

VAROUTSOS, KOUTOULAKOS,
ARTHUR AND HILTON

By /s/ LOUIS KOUTOULAKOS
Counsel for Defendants
2054-14th Street North
Arlington, Va. 22201

CERTIFICATE OF SERVICE

I hereby certify that on this *10* day of April, 1973, true copies hereof were mailed, postage prepaid, to attorneys for plaintiffs, Robert M. Alexander, Esq., 2011 S. Glebe Rd., Arlington, Va. 22204, and Allison W. Brown, Jr., Esq., Suite 437, 3000 Connecticut Ave., N.W., Washington, D. C. 20008.

/s/ LOUIS KOUTOULAKOS
Louis Koutoulakos

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

[Title omitted in printing]

* * * * *

ANSWERS OF RAYMOND GONZALES AND MARGARET R. GONZALES TO INTERROGATORIES

COMMONWEALTH OF VIRGINIA, SS:

[Filed April 15, 1975]

Raymond Gonzales and Margaret R Gonzales, plaintiffs herein, being first duly sworn according to law, on oath, give the following answers to the interrogatories propounded by defendants:

1. Raymond Gonzales.

2. One parent (Raymond Gonzales)

3. It was earlier than June 15. It now appears to have been in May 1969. The conversation was in the morning.

4. The name is unknown; it was a male who represented himself as authorized to speak for Bobbe's Private School concerning enrollment matters.

5. No application was filed, since after Raymond

Gonzales was told that his son would not be accepted because he is Negro, it appeared that it would be futile to even request an application form.

6. No.

7. He was enrolled in the years 1969-1970 and 1970-1971 at Congressional School, a private school located at 3229 Sleepy Hollow Road, Falls Church, Virginia. In 1971-1972 and 1972-1973 in St. Anthony's Catholic School, 3305 Glen Carlyn Road, Falls Church, Virginia.

8. Colin M. Gonzales is of the Negro race.

/s/ RAYMOND GONZALES
Raymond Gonzales

Subscribed and sworn to before me this *10th* day of April 1973.

/s/ WILLIAM B. PETERS
Notary Public

My Commission expires 10/5/73.

/s/ MARGARET R. GONZALES
Margaret R. Gonzales

Subscribed and sworn to before me this *10th* day of April 1973.

/s/ WILLIAM B. PETERS
Notary Public

My Commission expires 10/5/73.

CERTIFICATE OF SERVICE

I hereby certify that on this *13th* day of April 1973, I mailed a copy of the foregoing answers to interrogatories, first class, postage prepaid, to Louis Koutoulakos, Esq. 2054 14th Street North, Arlington, Virginia 22201, attorney for defendants.

/s/ ALLISON W. BROWN, JR.
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

[Title omitted in printing]

* * * * *

ANSWERS OF CURTIS L. McCRARY
AND SANDRA McCRARY TO INTERROGATORIES

COMMONWEALTH OF VIRGINIA, SS:

Curtis L. McCrary and Sandra McCrary, plaintiffs herein, being first duly sworn according to law, on oath, give the following answers to the interrogatories propounded by the defendants:

1. The name is unknown; it was a male who identified himself as authorized to speak for the school concerning enrollment matters.

2. Morning.

3. Mrs. McCrary stated that she had heard about Bobbe's Private School and that she was interested in enrolling her son. She asked various questions about the school and how it operated. She inquired about, and received assurance that her son could attend even though he was under 3 years of age. She was told that there was an extra fee for a child who was not toilet trained. She was told about the school's policy of providing hot meals for the children, and of providing transportation if it was needed. Finally, Mrs. McCrary indicated that her son is a Negro, and asked whether this would be an obstacle to his attending the school, in other words, whether the school was integrated. The person with whom she spoke said he was sorry but they did not accept Negro children.

4. In view of the foregoing conversation, Mrs. McCrary assumed that she could not get an enrollment application from Bobbe's Private School and that any further efforts to enroll Michael would be futile.

5. Yes. inquiries were made to several other schools.

6. Michael is now enrolled in a home nursery operated by Mrs. Elbert Green, 2217 S. Oakland Drive, Arlington, Virginia. He has been enrolled there since September 1972.

7. The discussion over the telephone described in the answer to interrogatory No. 3, above, did not reach the stage where any mention was made of an enrollment application. Having been told that her son was unacceptable, Mrs. McCrary did not ask for an application form.

8. Objection is made to this interrogatory (misnumbered

as No. 7) on the advice of counsel who advise that the question of the nature of the class represented by the plaintiffs is a matter of law as discerned from the allegations of the complaint, and the question concerning retention of attorneys relates to privileged matter.

/s/ CURTIS L. McCRARY
Curtis L. McCrary

Subscribed and sworn to before me this *11* day of April 1973.

/s/ ARTHUR R. POWELL
Notary Public
State of Virginia
County of Arlington

My Commission expires July 28, 1975.

/s/ SANDRA McCRARY
Sandra McCrary

Subscribed and sworn to before me this *10* day of April 1973.

/s/ ARTHUR R. POWELL
Notary Public
State of Virginia
County of Arlington

My Commission expires July 28, 1975.

CERTIFICATE OF SERVICE

I hereby certify that on this *13th* day of April 1973,

I mailed a copy of the foregoing answers to interrogatories, first class, postage prepaid, to Louis Koutoulakos, Esq. 2054 14th Street North, Arlington, Virginia 22201, attorney for defendants.

/s/ ALLISON W. BROWN, JR.
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION
Civil Action Nos. 494-72-A and 495-72-A
[Title omitted in printing]

* * * * *

MEMORANDUM OPINION AND ORDER

[Filed April 16, 1973]

Defendants have moved to dismiss this action as brought by three of the named plaintiffs contending that the statute of limitations has run.[1] This is a civil rights action seeking redress for the violation of the plaintiffs' rights resulting from racial discrimination practiced by the defendants in connection with the admission of children to Bobbe's Private School. 42 U.S.C. § 1981.

[1] The Motion to Dismiss raised other issues, as to all of which the motion was denied in an oral ruling from the bench after argument on April 6, 1973. The issue of the statute of limitations was taken under advisement.

The injuries alleged and the relief sought in this case sound in tort. Although this is a 42 U.S.C. § 1981 rather than a § 1982 or § 1983 action, the applicable limitation is governed by *Almond v. Kent*, 459 F.2d 200 (4th Cir. 1972); *Allen v. Gifford* 462 F.2d 615 (4th Cir.), cert. denied, sub nom., *Gifford v. Allen*, 93 S. Ct. 128 (1972). In those cases Virginia's two year statute of limitations was applied to personal injury suits based on racial discrimination. It is apparent that the damages claimed by Raymond and Margaret Gonzales, as parents of Colin Gonzales, are barred since the two year statute of limitations began to run on June 15, 1969, more than two years before this suit was filed. The limitation period has not been tolled as to Colin Gonzales since it does begin to run until he, a minor, attains the age of majority. *Davenport v. Deseret Pharmaceutical Company*, 321 F. Supp. 659, 660 (E. D. Va. 1971).

Accordingly, the claim of Raymond and Margaret Gonzales for damages is dismissed. The requests for declaratory and injunctive relief, based as they are on alleged continuing wrongs, are not dismissed; and it is so ordered.

/s/ A. V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
April 16th, 1973

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

[Title omitted in printing]

* * * * *

MOTION TO INTERVENE AS PARTY DEFENDANT

[Filed June 15, 1973]

Upon the annexed affidavit, the prior proceedings had herein, and the memorandum of law submitted herewith, the undersigned, a non-profit corporate association representing six state private school organizations, 395 private schools with an enrollment of 176,000 studens and their respective parents, for itself, and as class representative of all other private schools having admission requirements limited in terms to a constitutionally significant ciass, moves this Court pursuant to Rules 23 and 24 of the Federal Rules of Civil Procedure for an order permitting its intervention as individual and class party defendant, and allowing the filing of its annexed answer to the complaint herein,

> . . . As a matter of right under Rule 24(a) in that the undersigned and each member of the class similarly situated has an interest in the transaction which is the subject of the action, is so situated that the disposition of the action may as a practical matter impair or impede their ability to protect that interest, and their interest herein is not adequately represented by existing parties; or
>
> . . . In any event, as a matter of sound judicial discretion under Rule 24(b) in that the particular defenses of this movant and the class of

schools and associations similarly situated raise questions of law and fact in common with the existing action and such intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

Respectfully submitted

Southern Independent School Association
P.O. Box 1675
Jackson, Mississippi 39205

By _____
Edith D. Hakola, Esq.
1400 N. Uhle Street
Arlington, Virginia 22201
703-522-5634

Of Counsel:

GEO. S. LEONARD, Esq. and
LEONARD, CLAMMER & FLUES
1225 Connecticut Avenue, N.W.
Washington, D. C.

June , 1973

CERTIFICATE OF SERVICE

Pursuant to Rules 5 and 24 of the Federal Rules of Civil Procedure, service of the foregoing motion, together with each of the papers therein referred to, has been duly made this day by first class mail prepaid upon the parties hereto, to wit, upon Robert M. Alexander, Esq., 2011 South Glebe Road, Arlington, Virginia 22204, Allison W. Brown, Jr., Esq. Suite 437, 3000 Connecticut Avenue, N.W.,

Washington, D. C. 20008, Louis Koutoulakos, 2054 14th Street North, Arlington, Virginia 22201.

_____
Edith D. Hakola

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

[Title omitted in printing]

* * * * *

PLAINTIFFS' ANSWER TO COUNTERCLAIM

[Filed June 19, 1973]

Come now the Plaintiffs by Counsel and answer the Counterclaim filed herein by the Intervenor-Defendant as follows:

1. Plaintiffs admit the truth of the allegations contains in Paragraph 11 of said Counterclaim.

2. Plaintiffs deny the allegations contained in Paragraphs 12, 13, 14, 15, and 16 of said Counterclaim.

WHEREFORE, having fully answered said Counterclaim, Plaintiffs prays.

1. That said Counterclaim be dismissed.

2. And for such appropriate relief against the Intervenor-Defendant deemed meet and just.

Respectfully submitted,

/s/ ROBERT M. ALEXANDER
Robert M. Alexander
Attorney for Plaintiffs
2011 South Glebe Road
Arlington, Virginia 22204

CERTIFICATE OF SERVICE

Copies of the foregoing Answer were mailed to Louis Koutoulakos, Esq., Edith D. Hakola, Wesley D. McDonald and B. Austin Newton, Defense Counsel in consolidated cases 494-72-A & 495-72-A, this 18th day of June, 1973.

/s/ ROBERT M. ALEXANDER
Robert M. Alexander

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

[Title omitted in printing]

* * * * *

ANSWER OF INTERVENOR

[Filed June 21, 1973]

For its answer to the complaint herein, intervenor-defendant Southern Independent School Association,

FIRST, SECOND, THIRD AND
FIFTH DEFENSES

Adopts as if set forth herein in full, the First, Second, Third and Fifth defenses pleaded in the answer of the individual defendants.

FOURTH DEFENSE

1. Denies that the private schools represented by intervenor are places of public accomodation, or are engaged in or affect interstate commerce or, by definition or policy intendment, come within the terms of 42 U.S.C. 2000a or any other section of the Civil Rights statutes, or that admission thereto constitutes a contract within the meaning of 42 U.S.C. 1981, or that white, black, or any other children have a right of compulsory admission thereto.

2. Denies knowledge or information sufficient to form a belief as to the alleged custom, practice or policy of the defendants and further avers that with respect to private schools of the class represented by intervenor, the selection or rejection of applicants constitutes an exercise of the freedom of association of the respective parents acting in their private capacity as citizens and is a protected expression under the First Amendment to the Constitution of the United States of a reasonable belief that homogeneity in a student body is educationally advantageous.

3. Denies knowledge or information sufficient to form a belief as to whether any class of similarly situated Negro citizens exists, or that the claims of these plaintiffs are typical of the claims of the class they purport to represent.

4.-7. Denies knowledge or information sufficient to form

a belief with respect to the allegations contained in the corresponding paragraphs of the complaint.

8.–10. Denies the allegations contained in the corresponding paragraphs of the complaint and specifically repeats the denials set forth in paragraph 1 hereof.

COUNTERCLAIM

11. Jurisdiction of this court over the federal question involved is invoked pursuant to 28 U.S.C. §§ 1331 and 2201, and also pursuant to the pendent jurisdiction of the court arising by virtue of the principal action. The amount in controversy exceeds $10,000 exclusive of interest and costs.

12. Intervenor is an incorporated, nonprofit association of six state private school associations in Virginia, North Carolina, South Carolina, Alabama, Mississippi and Louisiana and of otherwise unaffiliated private schools located in the State of Georgia. Intervenor represents 395 private schools having an enrollment of 175,000 students. Such schools are supported and maintained in principal part by tuition charges paid by the parents of the said students, no part of which diminishes the taxes which the same parents are required to pay for the support of public education. No such school is created or administered by public authority nor is located in an area lacking effective public educational facilities. Admission to all such schools is permitted to applicants only in the discretion of the school authorities and no individual of any race, creed or sex has any right to compulsory admission.

13. In organization, financing and legal contemplation, such schools are believed to be representative of the class of all private educational organizations which limit instruction to student groups selected on the basis of locally determined

but constitutionally significant classifications.

14. The private schools represented by intervenor have on the average achieved academic levels of student learning which, measured on the basis of nationally accepted tests, are substantially higher than the levels achieved in comparable open public school classes either in their immediate area or as measured against national public school averages. Such scholastic results have been achieved at per pupil capital and operating costs well below comparable costs in the public school systems. Such schools provide to their students patriotic and religious observances which are desired by the parents concerned but are no longer permitted in public schools. Such schools are substantially free of vandalism, theft and other petty crimes which reportedly characterize integrated public school systems. The scholastic and disciplinary results achieved by such private schools are in major part the scientifically demonstrable effect of limiting admission to homogeneous student groups having compatible learning requirements.

15. The parents of the students in the schools represented by intervenor have reasonable cause to believe that the enrollment of their children therein will result in an improved education, and such parents are guaranteed the freedom to so express themselves by peaceful withdrawal of their children form public schools, under the Second and Third Clauses of the First Amendment.

16. Plaintiffs and their class, by paragraph 1 of the prayer of their complaint for declarative judgment seek the aid of this court to deprive such parents and children in the schools represented by intervenor of the Constitutional rights so referred to, such deprivation would in turn adversely affect the viability and value of the private schools amounting to an unconstitutional deprivation

of property. Accordingly, there exists an actual controversy between classes represented by plaintiff and intervenor with respect thereto.

WHEREFORE, intervenor prays a judgment of this court,

1. Dismissing the complaint, and

2. Affirmatively declaring the rights of the parents parents represented by intervenor to support and maintain at their own cost private schools limiting admission to a single race or other constitutionally significant student group.

Respectfully submitted,

Southern Independent School Association
P. O. Box 1675
Jackson, Mississippi 39202

By _____
Counsel
Edith D. Hakola
1400 N. Uhle Street
Arlington, Virginia 22201
522-5634

Of Counsel:

Geo. S. Leonard
Leonard, Clammer & Flues
1225 Connecticut Avenue, N.W.
Washington, D. C. 20036

CERTIFICATE OF SERVICE

Pursuant to Rules 5 and 24 of the Federal Rules of Civil Procedure, service of the foregoing Answer has been duly made this day by first class mail prepaid upon the parties hereto, to wit, upon Robert M. Alexander, Esq., 2011 South Glebe Road, Arlington, Virginia 22204, Allison W. Brown, Jr., Esq., Suite 437, 3000 Connecticut Avenue, N.W., Washington, D. C. 20008, Louis Koutoulakos, Esq., 2054 14th Street North, Arlington, Virginia 22201.

_____
Edith D. Hakola

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

[Title omitted in printing]

* * * * *

ORDER

[Filed July 9, 1973]

Upon consideration of the Motion to Intervene of the Southern Independent School Association and Affidavit of William J. Simmons, its president, and Memorandum in Support of Application for Intervention, and there being no objection by parties plaintiff or defendant to such intervention, it is,

ORDERED that the Southern Independent School Association be and is permitted to intervene as an individual and class party defendant in this action; and it is further,

ORDERED that the Answer of the Southern Independent School Association be filed and Answer made thereto; and it is further,

ORDERED that George Leonard, Esq. is admitted as counsel *pro hac vice* for the Southern Independent School Association in this action.

/s/ A. V. BRYAN, JR.
Albert V. Bryan, Jr.,
Judge

/s/ EDITH D. HAKOLA
Edith D. Hakola, Esq.
1400 N. Uhle Street
Arlington, Virginia 22201
703-522-5634
Counsel for Intervening Party

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

[Title omitted in printing]

* * * * *

STIPULATION

[Filed July 13, 1973]

1. A substantial proportion of the schools represented by intervenor deny admission to applicants of the Negro race.

2. The schools represednted by intervenor admit applicants only in the discretion of the school authorities.

3. The schools represented by intervenor are privately owned, financially supported by tuition paid by the parents of the students and, in some cases, supplementary private gifts.

4. The schools represented by intervenors are located in areas having cost-free, desegregated public education available to all children, and the parents of the students in schools represented by intervenor are taxpayers who pay their proportionate share of federal, state and local taxes for the maintenance of such public system of education.

5. The sole basis of jurisdiction asserted by plaintiffs in this action is 42 U.S.C. 1981.

(July 13, 1973) /s/ ALLISON W. BROWN, JR.
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

[Title omitted in printing]

* * * * *

ORDER

[Filed September 14, 1973]

Upon consideration of the Motion to Compel Production of Information and to Amend the Court's Judgment filed by plaintiffs herein, it is,

ORDERED that the Southern Independent School Association, intervenor-defendent, shall within *30* days from the date of this order file with the Court, and serve upon the parties hereto, a list of the names and addresses of the 395 schools that are represented by said Association in this action; and it is further,

ORDERED that said list shall thereafter be incorporated in this Court's judgment dated July 27, 1973, and that the schools so listed shall be bound by said judgment.

/s/ A. V. BRYAN, JR.
United States District Judge

Date: September 14, 1973.

/s/ ROBERT M. ALEXANDER
Counsel for Plaintiffs

SEEN AND AGREED:

_____
Counsel for Intervenor

_____
Counsel for Defendant

SUPPLEMENT TO MEMORANDUM OPINION AND ORDERS
DATED JULY 27, 1973

1. The counterclaim of intervenor is dismissed for failure to state a cause of action.

2. The proffered testimony of intervenor described on page 8 of said Memorandum Opinion was admitted into evidence subject to the Court's reserved ruling on relevance.

3. Intervenor shall furnish the Clerk with the names of the schools in the component associations of the Southern Independent School Association within 30 days.

And it is so ordered.

United States District Judge

Alexandria, Virginia
September 24, 1973

A True Copy, Teste:
W. Farley Powers, Jr., Clerk

By _____
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action Nos. 494-72-A and 495-72-A

[Title omitted in printing]

* * * * *

MEMORANDUM OPINION AND ORDER

[Filed July 27, 1973]

On May 17, 1954, the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954). The same year Fairfax-Brewster School was founded. It commenced

operations in 1955. In 1958 Bobbe's Private School commenced operations. Neither school receives and assistance, financial or otherwise, from any state, local or federal agency; and each relies entirely on funds derived from tuition paid by students to support its operations. In 1956 Fairfax-Brewster commenced operation of a summer day camp and in 1967 Bobbe's did the same thing.

The enrollment at Fairfax-Brewster School grew from an average of 21 in the first year, 1955-56, to 223 in the year 1972-73. The rise in enrollment has generally been increasing except for the year 1969-70 when it dropped to 177 from the previous year's 208. The day camp's enrollment records are not available prior to 1962, but it shows a growth from 21 that year to 236 in the summer of 1972. An unusually large increase was shown in 1969 over the previous year, but this dropped back in 1970.

Bobbe's School grew from 5 in 1958 to an average of 200 in the years 1966-72. The day camp has averaged 100 students per year since its commencement. Neither school has ever had a black enrolled at either its day camp or school. Both schools require submission of an application form, a medical certificate as to the child's health, and a personal interview with the parties.

In early May of 1969, in response to an advertisement appearing in the "yellow pages" of the telephone directory similar to Pltf's Ex. 3, the parents of Colin M. Gonzales, both of whom are black, as is Colin, telephoned and then visited the school where they were shown around. Being pleased with what they saw, they completed, on forms then furnished them by the school, an application for the day camp and later a medical certificate prepared by a doctor. They subsequently submitted these to the school

with a check for either $15 or $20. On May 16, 1969, Mr. and Mrs. Gonzales received the medical certificate and check in the mail with a form letter from Fairfax-Brewster (Pltf's Ex. 2) stating that the school was "unable to accommodate the application." No reason was given. Upon receipt of the letter Mr. Gonzales called the school, spoke to a person who identified himself as Captain Reiss,[1] and, in response to his inquiry as to why his son's application was rejected, was told "we are not integrated." Both Robert S. Reiss and Stuart Reiss denied any such conversation. They then stated that Colin, whom they believed was primarily interested in entering the first grade, was rejected, not on the basis of his race, but because his application lacked supporting data as to his previous schooling. Moreover, knowing that Colin had previously attended Crossroads Day Nursery, they claimed he would not qualify for the first grade. Consequently, since eligibility for the day camp was contingent on one's being qualified for the first grade, they felt it would be unfair to allow Colin to enter the day camp and then have to be withdrawn before the commencement of the academic year. In conclusion, the three Reisses all denied that it was the school or day camp's policy to exclude an applicant because of his race. The Court rejects this testimony as unbelievable and finds that the reason for the rejection was because Colin was black.

Subsequent to his son's rejection by Fairfax-Brewster, Mr. Gonzales telephoned Bobbe's School where, in answer to an inquiry as to whether it was integrated, he was told

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[1] Capt. Stuart A. Reiss is the Chairman of the Board while his son, Robert S. Reiss, is the Administrative Director, and his daughter-in-law, Olga M. Reiss, the registrar.

that only members of the Caucasian race were accepted. He filed no formal application with Bobbe's School.

Application was ultimately made for Colin at Congressional School, a non-public school, where he was accepted and did well.

In August, 1972, in response to an advertisement in the "yellow pages" of the telephone directory, Mrs. Sandra McCrary, who is black, called Bobbe's Private School to enroll her 2 year old son, Michael, in nursery school. After first inquiring as to the price, policies, meals, transportation and facilities for "toilet training," she asked if the school was integrated. Upon received a negative reply, she asked if the school accepted black children. The answer to this question was also "no." She filed no formal application with Bobbe's.

Bobbe's denied receiving telephone calls from either Mr. Gonzales or Mrs. McCrary; stated that it was not the policy of the school to exclude anyone because of race; denied that the school has ever told anyone that the school was not integrated; and stated that no one can be considered without a personal interview with the applicant and his parents or without a formal application being submitted with an accompanying medical certificate. Bobbe's introduced further testimony that no black child had ever applied for enrollment.

The Court finds that the calls were made to Bobbe's and that both Colin Gonzales and Michael McCrary were denied admission because they were black. It is of no moment that no formal application was filed. It would be ridiculous to require this of the plaintiffs after they had effectively been told it was useless.

The policy of the schools with regard to exclusion of blacks was corroborated by Mrs. Bryant and Mr. Brooks. The former testified that in 1972 she telephone Fairfax-Brewster and Bobbe's School to inquire about their admissions policies. She testified that both schools told her they were not integrated and would not accept blacks. Mr. Brooks, a deputy Equal Employment Opportunity Commission officer with the Navy and Mrs. McCrary's supervisor, testified that after he became aware of the McCrary's allegations as raised in this suit against Bobbe's he decided to call for himself. He stated that during his telephone conversation of May 31, 1973, with a Mr. Gates at Bobbe's, he asked whether the school was accredited and if it was integrated. Upon receiving a negative response to the latter question Brooks further asked if blacks were admitted. Again he was told "no."

Colin Gonzales has filed an action against Fairfax-Brewster. Mr. and Mrs. McCrary, Michael McCrary, and Colin Gonzales have filed an action against Bobbe's. The sole basis for the actions is 42 U.S.C. § 1981.[2] The Southern Independent School Association intervened as a party-defendant in the action against Bobbe's, asserting that it represents "non-profit, private white schools in seven states and the class of all similarly situated schools and their associated students and parents."

The intervenor takes a different tack from that of the principal defendants. It concedes that race is a factor in its policies of exclusiveness, but says that 42 U.S.C.

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[2]Originally 42 U.S.C. § 2000a was alleged as a basis for the actions. This was withdrawn prior to trial.

§ 1981 cannot be used to compel admission of a black child to a white school of the type it represents, and prays an adjudication to that effect.

The actions were consolidated and tried on July 16 and 17, 1973.

No determination was made prior to trial that the actions might be maintained as a class action, either as asserted by the plaintiff or the intervenor; and the Court does not feel it should be so maintained. Accordingly the decision is only binding on the named plaintiffs, the named defendants, and those schools which actually comprise the intervenor.

42 U.S.C. § 1981 reads as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

If read literally the act covers these plaintiffs, who have been denied their right to make a contract with the defendants because they are not white. That it is to be read literally is no longer open to question. In considering 42 U.S.C. § 1982, the Supreme Court has said that ". . . Congress meant exactly what it said." *Jones v. Mayer Co.*, 392 U.S. 409, 422 (1968). Interrelated as § 1981 and § 1982 are, there is no reason to

think Congress meant any less when it enacted § 1981. *Tillman v. Wheaton-Haven Recreation Ass'n.*, 41 U.S.L.W. 4311 (February 27, 1973). The purpose of both is to prohibit all racial discrimination against non-whites,[3] whether that infringement be "by 'State or local law,'" or "by 'custom, or prejudice.' " *Jones v. Mayer Co.*, *supra*, at 423. In other words, no state action is necessary to invoke § 1981.

Although both schools claim to have strictly established criteria for enrollment, the end result of their admission policies as applied to both Colin and Michael evidences no "plan or purpose of exclusiveness" for selection of students *"other than race."* (Emphasis added.) *Sullivan v. Little Hunting Park*, 396 U.S. 229, 236 (1969). This disposes of the argument that these were "truly private" schools since the opportunity to attend these schools was open to every white child. *Tillman*, at 4313 and 4314. It is difficult to accept the defendants' argument that the plaintiffs may not have been qualified to meet their schools' high standards. This answer is certainly unavailing with regard to the day camp or nursery and is suspect insofar as the first grade is concerned since Colin Gonzales, because of his

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[3] The analogy to all black academies, all Chinese schools, and all rabbinical schools is inapposite. These institutions don't fall within the proscription of § 1981. Whatever else may be said of their policies, those institutions are free to discriminate against whites, or against other non-whites if whites are similarly discriminated against, without running afoul of § 1981.

race, was never given the opportunity to demonstrate that he was qualified.[4]

Intervenor proffered testimony which would establish:

1. That intervenor parents act rationally in holding a belief that segregation is desirable in education in light of the performance record of these schools and current scientific theory; and

2. That the intervenor schools are academically successful beyond the national public school average and have low disciplinary problems, both of which are causally related to segregated policies.

The Court finds this testimony to be irrelevant to the issue in these actions, feeling that such testimony, as a defense to outlawed policies of segregation, embodies a concept rejected in *Brown v. Board of Education, supra.*

Intervenor has seized on certain dicta of the Supreme Court in *Norwood v. Harrison*, 41 U.S.L.W. 5094 (June 25, 1973), which states that "private bias" is not proscribed by the Constitution and that "private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment. . . ." Conforting as these words may be to the defendants out of

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[4]The defendant Fairfax-Brewster points to page 2 of its handbook (Def's Ex. 2) to indicate that Colin Gonzales should have submitted a report card and other pertinent records from his previous school, the omission of which was a ground for his rejection. The same page of the handbook provides for Entrance Examination if previous scholastic records are inadequate. Colin was denied the opportunity to take this examination since he was never told that his scholastic record inadequacy was the reason for his rejection.

context, it must be pointed out that § 1981 was not there involved; that *Jones v. Mayer Co.* was cited to the contrary as an example of private discrimination made unlawful by Congress; and that the opinion specifically points out that "[t] his case does not raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race or religion. . . ." *Norwood v. Harrison,* at 5095. Moreover, although perhaps not legally significant, as a practical consideration, it is inconceivable that the opinion in the case would have attained the indicated degree of unanimity if it stood for the proposition urged by the intervenor. Accordingly the Court feels *Norwood* is not authority for that proposition.

While no relief is sought under 42 U.S.C. § 2000a et seq., it seems appropriate to point out that, in the Court's view, this act is not a limitation on § 1981, and consequently the exemption of 42 U.S.C. § 2000a(e) for private establishments does not apply in this case. Moreover, as indicated before, *Sullivan v. Little Hunting Park* has abolished traditional notions of what is "private" insofar as these types of actions are concerned.

Plaintiffs are accordingly entitled to the relief requested, namely:

A. An adjudication that the policies with respect to the admission of students to defendants' day camp and school, of discriminating on the basis of race or color, are a violation of 42 U.S.C. § 1981.

B. A permanent injunction against the defendants and intervenor, their agents and those acting in concert with them, prohibiting them from following the policies described in Paragraph A.

C. An award of compensatory[5] damages for the embarrassment, humilation and mental anguish which the Court finds to have been suffered by the plaintiffs as follows:

1.	In favor of Colin Gonzales:	
	(a) Against Fairfax-Brewster School	$2,000
	(b) Against Bobbe's School	500
2.	In favor of Michael McCrary against Bobbe's School	1,000
3.	In favor of Sandra McCrary and Curtis L. McCrary against Bobbe's School	2,000

D. An award of attorney's fees as follows:

1.	Against Fairfax-Brewster School	$1,000
2.	Against Bobbe's School	1,000

E. Their costs.

And it is so ordered.

/s/ A. V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
July 27th, 1973

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[5]Punitive damages are not awarded. While the defendants' acts have here been declared improper, insofar as the Court can determine similar acts have not heretofore been so declared. Accordingly the defendants cannot be said to have acted recklessly or willfully in disregard of clear existing law.

Plaintiffs' Exhibit No. 1

BOBBE'S PRIVATE SCHOOL
820 SOUTH CARLYN SPRING ROAD
ARLINGTON, VIRGINIA 22204
671-6545

I _____ GIVE TO
WILLIAM C. GATES OR KATHERYNE B.
OR RUSSELL L. RUNYON PERMISSION
TO TAKE MY CHILD _____
TO THE CHILD'S PHYSICIAN OR ANY
HOSPITAL FOR EMERGENCY TREATMENT
IN THE EVENT OF MY ABSENCE

_____
PARENT'S SIGNATURE

Plaintiffs' Exhibit No. 3

BOBBE'S PRIVATE SCHOOL

820 SOUTH CARLYN SPRING ROAD
ARLINGTON, VIRGINIA 22204
671-6545

★

MRS. KATHERINE B. RUNYON, *Director*

Founded 1958

★

MODERN BRICK FIRE-PROOF BUILDING
OPEN YEAR 'ROUND
ALL DAY — HALF DAY PROGRAMS
INDIVIDUAL — AGE NURSERY GROUPS
SUMMER CAMP PROGRAM
COMPLETELY AIR CONDITIONED

LICENSED BY
FAIRFAX COUNTY and STATE

TRANSPORTATION OFFERED

BOBBE'S PHILOSOPHY

Bobbe's School is more than supervised play. It provides the guidance for young children's need for the maximum development of their abilities and to make this for every child a good year of living and learning.

ENROLLMENT PROCEDURES

REGISTRATION:

Before an enrollment can be accepted, a personal interview between the administrative office, the parents and the child is necessary. Registration fee must be paid before application can be processed.

PHYSICAL EXAMINTION:

A physical examination form, signed by the child's physician, must be submitted to the office by the child's first day of school.

BOOKS:

Grade school children purchase or rent their own textbooks and workbooks. At the time of registration, the person conducting the interview will let you know whether the books will be for sale or rent.

PROGRAMS OFFERED

NURSERY PROGRAMS — Ages 2 and 3

- ½ day program.
- All-day program and day care.

PREP-KINDERGARTEN — Age 4

- ½ day educational program.
- All-day school includes educational program.

KINDERGARTEN — Age 5

- ½ day educational program.
- All-day school includes educational program.

FIRST GRADE AGE LIMITS:

In general, students will be accepted in first grade if their sixth birthday occurs before December 31.

SECOND GRADE AGE LIMITS:

In general, students will be accepted in second grade if their seventh birthday occurs before December 31; and have completed first grade. An entrance examination will be required also.

GENERAL INFORMATION

VISITING CLASSES:

If it is necessary for a parent to visit a class, a definite appointment, convenient to the class schedule, must be made through the office. Before visiting the class, the parent will check in with the office, and his arrival will be announced to the teacher. Visits in general should be limited to 20 minutes.

SICK CHILDREN:

Children with bad colds or contagious diseases must remain at home. If a child becomes ill after arriving at school, the parents will be asked to take him home as soon as possible. The school should be notified of a contagious disease. A Doctor's certificate is necessary to re-enter school after a contagious disease.

TOYS:

The school advises that no toys be brought to school, except for special "Show and Tell" days or for other designated classroom projects. This day will be designated by each teacher.

BIRTHDAYS:

If a child wishes to celebrate his birthday at school, the parents may bring the necessary refreshments and the school will hold the party in the cafeteria. At least three days notice should be given to the office.

OFFICE HOURS FOR ENROLLMENT:

9:00 A.M. to 11:00 A.M.
12:00 P.M. to 2:00 P.M. (Appointment only)
5:30 P.M. to 6:00 P.M. (Appointment only)

SCHOOL HOURS:

7:00 to 5:50 P.M.
5:50 to 6:00 P.M. (Grace period)
After 6:00 P.M. (Late charge)

Grace period should not be used except for emergencies only.

TUITION:

Tuition is paid on a weekly installment. Tuition is paid on Mondays only. If tuition is not paid on Mondays, a $1.00 a day service charge is required. At the time the application is taken, the child's first three weeks of tuition must be paid: which will apply to his first three weeks of school. Tuition becomes due weekly after the first week of school. This leaves the school holding two weeks of tuition which will go for the child's last two weeks of school. Tuition is not refunded or adjusted for any reason. Tuition fees will be discussed at the time of the interview, as it varies for the different age groups.

Tuition includes snacks, a hot meal and general school supplies.

INSURANCE:

The school offers two insurance programs: a school-time protection and a twenty-four hour protection.

WITHDRAWAL:

In case of withdrawal, two week's notice must be given to the office, on Mondays only, otherwise parents will forfeit two week's tuition.

CLOTHING AND EQUIPMENT:

The school does not require a uniform. Students will dress in a neat and appropriate manner. Pre-school children should wear general play clothes.

All outer clothing, accessories and other equipment must be marked with the child's name.

CALENDAR HOLIDAYS

January—New Year's Day.
February—George Washington's Birthday.
Easter—Good Friday and Easter Monday.
May—Memorial Day.
July—Independence Day.
September—Labor Day.
November—Veteran's Day.
November—The last Thursday and Friday of the month for Thanksgiving Holidays.
December—Christmas Day and the day before or after, depending on Chirstmas Day.

If a Holiday falls on Saturday, school will be closed on Friday.

If a Holiday falls on Sunday, school will be closed on Monday.

NOTE: If it becomes necessary to alter this notice, a supplementary notice will be posted.

SCHOOL IS NEVER CLOSED DUE TO THE WEATHER.

CAMP

CAMP is an extra fee to your basic weekly tuition and is offered for children, four years and older, during the summer months. Even though the school is open for the working parents, year-round, there is an additional charge for a child to go to camp. Fees and programs for Summer Camp can be discussed at the time of application. Illustrations of camp activities are on the following pages.

APPLICATION

Type or Print

Child's Name: .....
Address: .....
.....
Age: ..... Birth: .....
Home Phone: .....
Mother's Name: .....
Employed By: .....
Working Hours: .....
Bus. Phone: .....
Father's Name: .....
Employed By: .....
Working Hours: .....
Bus. Phone: .....
Emergency Name: .....
Address: .....
Phone: .....
Relationship: .....
Doctor's Name: .....
Address: .....
Phone: .....
Parents Signature .....
Date: .....

Doctor's certificate of good health and shot record for .....
(Child's Name)

Polio Shots ..... Date
DPT Shots ..... Date
Smallpox Vac. ..... Date
Measles Vac. ..... Date
TB Test ..... Date
Allergies .....
.....
.....
Childhood Diseases .....
.....
.....

The above child is in good health and immunization are up to date.

.....
(Physician Signature)

Intervenor's Exhibit No. 1

EMERGENCY SCHOOL AID ACT OF 1970

EXTRACT OF

HEARINGS

BEFORE THE

GENERAL SUBCOMMITTEE ON EDUCATION

OF THE

COMMITTEE ON EDUCATION AND LABOR

HOUSE OF REPRESENTATIVES

NINETY-FIRST CONGRESS

SECOND SESSION

ON

H.R. 17846 and Related Bills

BILLS TO ASSIST SCHOOL DISTRICTS TO MEET SPECIAL PROBLEMS INCIDENT TO DESEGREGATION IN ELEMENTARY AND SECONDARY SCHOOLS AND TO PROVIDE FINANCIAL ASSISTANCE TO IMPROVE EDUCATION IN RACIALLY IMPACTED AREAS, AND FOR OTHER PURPOSES

HEARINGS HELD IN WASHINGTON, D.C., JUNE 8, 15, 17, 18, 24, 25, 29, 30; JULY 1, 6, 7, 8, 16; AND SEPTEMBER 23, 1970.

(Not Printed at Government Expense)

U.S. GOVERNMENT PRINTING OFFICE

418-016 O WASHINGTON : 1970

BEST COPY AVAILABLE

STATEMENT OF DR. ERNEST VAN DEN HAAG, PROFESSOR OF SOCIAL PHILOSOPHY, NEW YORK UNIVERSITY

Dr. VAN DEN HAAG. Let me express my gratitude for being given the opportunity to be heard on the very important bill before you.

(The prepared statement of Dr. van den Haag follows:)

STATEMENT OF DR. ERNEST VAN DEN HAAG, PROFESSOR OF SOCIAL PHILOSOPHY, NEW YORK UNIVERSITY

I. INTRODUCTION

Mr. Chairman and members of the Committee, my name is Ernest van den Haag. I am a Professor of Social Philosophy at New York University, a lecturer at the New School for Social Research in psychology and sociology, and a psychoanalyst in private practice. I received an M.A. degree from the University of Iowa, and a Ph. D. degree from New York University. I also have studied in Europe, at the Sorbonne (the University of Paris), the University of Florence, and the University of Naples. I have lectured at Harvard and Yale Universities. I am a member of the Society of Applied Psychoanalysis, Fellow American Sociological Association, Royal Economic Society, and New York Academy of Sciences; I am a Guggenheim Fellow (1957).

I am the author of *Education as an Industry* and the co-author of *The Fabric of Society*. I have published nearly 70 scientific articles in my fields, appearing in professional journals and encyclopedias as well as chapters in books, *e.g.*, "Psychoanalysis and its Descendents," appearing in *Psychoanalysis, Scientific Method and Philosophy*, and "Genuine and Spurious Integration," appearing in *Psychoanalysis and the Social Sciences*. I have delivered the Freud Memorial Lecture to the Philadelphia Psycho-analytic Association ("Psychoanalysis and Utopia").

My work mostly concerns study of the relationship of groups. Research in the field of social dynamics analyzes the causes of the formation of groups (including classroom groups or student groups) and how group members relate to others. Such studies are directly applicable to predict the educational result of compulsory congregation in schools.

On the basis of those studies, I appear today to question the validity of the purpose which the Emergency School Aid Act of 1970, H.R. 17846, is intended to serve. Essentially the bill seeks to end what is called racial isolation—defined as more than 50% minority attendance in a single classroom. It is the purpose of the bill as expressed in Section 2 to improve the quality of education in the United States by increasing the degree of compulsory classroom integration between the races. But it is simply assumed, without actual evidence, that integration will be educationally and psychologically beneficial.

This legislation before the Committee assumes fundamentally that academically and socially effective classroom groups can be formed by putting black and white students together in larger numbers in a single classroom regardless of their wishes and that this will improve their education and decrease the differences as well as hostilities which now exist between them. Yet such an enforced congregation of two identifiable racial groups, one deprived in relation to the other, does not diminish, but rather increases the divisive forces which now exist between these students and the consequent increase in classroom tension leads to a substantial decrease in the educational accomplishment of both groups and multiplies the disciplinary problems which detract from the essential student attention required for effective study.

If such integration is compelled, as this bill proposes to do, it will injure rather than assist the future educational accomplishment of the nation's schools.

The blacks who will feel humiliated by their low performance relative to white children—be it owed to genetic, economic, subcultural or family conditions—are

likely to react with redoubled hostility to white pupils, teachers and institutions—to schooling as a whole. It will be labeled "irrelevant."

II. GROUP MEMBERSHIP AND INDIVIDUAL IDENTITY

(1) Every individual needs to identify with a particular group. Such an identification is essential for the development of personality. This is clearly expressed by Dr. Glaister A. Elmer (Michigan State College) in "Identification as a Social Concept" (*Sociology and Social Research*, Vol. 39, No. 2 (1954), pp. 103–109).

"The social psychologists, however, '. . . should start first by relating the individual to his reference and membership groups and then proceed to the finer details of personality problems.' . . . In the building of group formation, the real identifications of individual beliefs are [illegible] solidarity is generated in them as a natural process which manifests itself in actual behavior. In other words, as a group is formed or as individuals become members of the group, the social process of integration is taking place. Besides the individual members of the group, the integration binds the social values and goals, the psychological [illegible] in group symbols with which the individual members become identified. The social identification which evolves thus constitutes the basis of the group solidarity from which results observable, measurable behavior.

". . . There must be a personal consciousness of 'belonging' or 'being a part' which is reflected in the opinions and behavior of the persons concerned. Group membership identification implies not an individual's reaction toward a group, but his reaction as a functioning element of the group."

(2) Men react selectively to their fellow men. This preferential association is based upon observable differences, among them overt physical differences and similarities, which form the focal point for group orientation and group identification. Professor George A. Lundberg (University of Washington; past president of the American Sociological Association) writes in "Some Neglected Aspects of the 'Minorities' Problem" (*Modern Age*, Summer, 1958, pp. 285–297):

". . . In every society men react selectively to their fellow men, in the sense of seeking the association of some and avoiding the association of others. Selective association is necessarily based on some observable differences between those whose association we seek and those whose association we avoid. The differences which are the basis of selective association are of an indefinitely large variety, of all degrees of visibility and subtlety, and vastly different in social consequences. Sex, age, marital condition, religion, socioeconomic status, color, size, shape, health, morals, birth, breeding, and B.O.—the list of differences is endless and varied, but all the items have this in common: (1) they are observable and (2) they are *significant* differences to those who react selectively to people with the characteristics in question. It is, therefore, wholly absurd to try to ignore, deny or talk out of existence those differences just because we do not approve of some of their social results. . ."

Professor Lundberg with an associate also studied high school students in Seattle, Washington, to find out the determinants of their preferential associations in leadership, work, dating, and friendship. Lundberg reported in "Selective Association Among Ethnic Groups in a High School Population" (*American Sociological Review*, Vol. 17, No. 1 (1952)). He found:

". . . every ethnic group showed a preference for its own members in each of the four relationships covered by the question.

". . . ethnocentrism or prejudice is not confined to the majority of the dominant group. . .

". . . A certain amount of ethnocentrism is a normal and necessary ingredient of all group life, *i.e.*, it is the basic characteristic that differentiates one group from another and thus is fundamental to social structure. Ethnocentrism ('discrimination,' 'prejudice') is, therefore, not in itself necessarily to be regarded as a problem. It is rather a question of determining *what do area* of it (a) is functional for social survival and satisfaction under given conditions, or at least (b) is

not regarded by a society as a problem in the sense of requiring community action. The amount of discrimination that has been shown to exist in the present study, for example, is not incompatible with the peaceful and efficient functioning of the institution in question . . ."

There are a substantial number of studies reported in social science literature which indicate that the attitudes reported in Landberg's study of Seattle, Washington, are not confined to that particular city. Indeed, social scientists find in all areas where groups of diverse origin and appearance come into contact, some degree of race preference and selective association is manifested by the various groups.

(3) At one time it was assumed that certain areas of the world were free from race prejudice. Hawaii and Brazil were often cited as examples of interracial "alohas" where all race prejudice had disappeared. More careful students of these areas have found that despite a superficial interracial harmony, racial preferences and prejudices are manifested in both these areas. In "Racial Attitudes in Brazil" (*American Journal of Sociology*, Vol. 54, No. 5 (1949), pp. 402-408), Dr. Emilio Willems described color prejudice in the city of Sao Paulo, Brazil, as manifested in a series of interviews carried out among middle and upper-class whites. Dr. Willems found:

". . . Of the 215 advertisers, 194 were interviewed about the reasons for their unfavorable attitude toward Negro servants. In this interview, 18 were unable to give any clear answer, but they found their own attitude 'very natural.' 18 advertisers did not accept Negro servants because of presumed lack of cleanliness; 30 thought black housemaids were always thieves; 14 alleged instability and lack of assiduity; and 12 said only that they were used to white servants and therefore did not wish to engage colored ones. Seven persons precluded Negroes because of the contact they would have with their young children. There were a few other reasons, such as 'race odor,' bad character,' laziness,' carelessness,' and other imperfections that were ascribed to Negro servants.

". . . There are many situations in social life where white people refuse to be seen with Negroes. In such public places as high-class hotels, restaurants, or casinoes, fashionable clubs and dances, Negroes are not desired, and there are few whites who dare to introduce Negro friends or relatives into such places. This discrimination was strongly resented by middle-class Negroes. On the other hand, those Negroes complained bitterly of the contemptuous attitudes that middle-class mulattoes assumed toward them.

". . . Yet our inquiry led to some other interesting results. In 23 out of 36 cases the questionnaires contained references to formal associations of all kinds from which Negroes were excluded. Usually these associations are clubs maintained by the upper-class families of the city. Though there does not exist any reference to Negro members in club statutes, these are rarely admitted . . ."

In "Stereotypes, Norms and Interracial Behavior in Sao Paulo, Brazil" (*American Sociological Review*, Vol. 22, No. 6 (1957)), Professors Roger Bastide and Pierre van den Berghe found on the basis of a questionnaire given to 580 white students from five different teachers' colleges in Sao Paulo, Brazil, that:

"Stereotypes against Negroes and mulattoes are widespread. Seventy-five per cent of the sample accept twenty-three or more stereotypes against Negroes. No one rejects all stereotypes against Negroes . . . Mulattoes are judged inferior or superior to whites on the same traits as Negroes but somewhat lower percentages. The most widely accepted stereotypes are lack of hygiene (accepted by 91 per cent), physical unattractiveness (87 per cent), superstition (80 per cent), lack of financial foresight (77 per cent), lack of morality (76 per cent), aggressiveness (73 per cent), laziness (72 per cent), lack of persistence at work (62 per cent), sexual 'perversity' (57 per cent), and exhibitionism (50 per cent)."

(4) Strong patterns of racial preference emerge in pre-school children—even as early as 2½ years of age. In "Evidence Concerning the Genesis of Interracial Attitudes" (*The American Anthropologist*, Vol. 48, No. 4 1946)), Dr. Mary Ellen Goodman investigated the age at which racial attitudes become manifest. Fifteen

Negro and twelve white children, ranging in age at the beginning of the study from 2-9 to 4-4 and who attended a bi-racial nursery school were studied. Dr. Goodman noted that "awareness of one's racial identity may be regarded as one facet of that consciousness of self which is gradually achieved during the first three or four years of life," and "preliminary analysis leads to the belief that these children of approximately 3 to 4½ years were in the process of becoming aware of race differences."

The early genesis of racial attitudes has been confirmed in other studies in "well-integrated" areas where there is an absence of overt racial hostility and legal racial segregation. Drs. Catherine Landreth and Barbara C. Johnson conducted such a study in the child care centers of Berkeley, Oakland, and San Francisco, California, and reported in "Young Children's Responses to a Picture and Inset Test Designed to Reveal Reactions to Persons of Different Skin Color" (*Child Development*, Vol. 24, No. 1, (1953)). They concluded that "patterns of response to persons of different skin color are present as early as three years and become accentuated during the succeeding two years."

Drs. Marion Radke, Gene Sutherland and Pearl Rosenberg studied the racial attitudes of children in Pittsburgh, Pennsylvania (*Sociometry*, Vol. 13, No. 2, 1953).

They found "the white children in all the situations and at all ages (seven to thirteen years) expressed strong preference for their own racial group. This is particularly the case when their choices between Negro and white children as friends are on an abstract or wish level."

(5) Some sociologists contend that Negroes would suffer far more from racial integration than from racial segregation. Thus Professor Johnson* notes that ". . . if the Negroes would refuse to identify themselves consciously with the Negroes as a social group, then they would develop a kind of collective neurosis, as do other minorities, too; for the conscious 'we' would in case of such an attitude be persistently in conflict with the unconscious 'we,' and this inner split would inevitably reflect itself in different pathological distortions of the Negro personality."

For contrast, Allison Davis (Racial Status and Personality Development, *The Scientific Monthly*, Vol. 57, Oct. 1943) noted ". . . where the social group of the racially subordinate individual is highly organized and integrated, as in the Little Italies or Chinatowns, or in many Southern Negro communities, its members will usually have relatively less personal conflict over their racial status." Similarly, Mozelle Hill ("A Comparative Study of Race Attitudes in the All Negro Community in Oklahoma," *Phylon*, 1946) noted that Negroes raised and educated in an all Negro community tend to have "a much higher regard for Negroes," and are more favorable in their expression toward their own race.

Intervenor's Exhibit No. 2

Stodolsky and Lesser: Learning Patterns in the Disadvantaged, 37 Harvard Educational Review 546 (Fall 1967 (Charts Only)

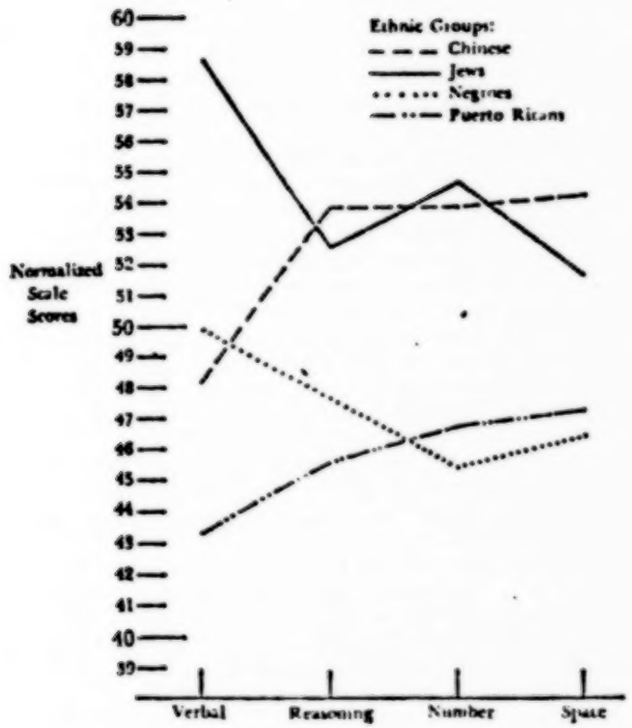

Fig. 1. *Pattern of Normalized Mental-Ability Scores for Each Ethnic Group*

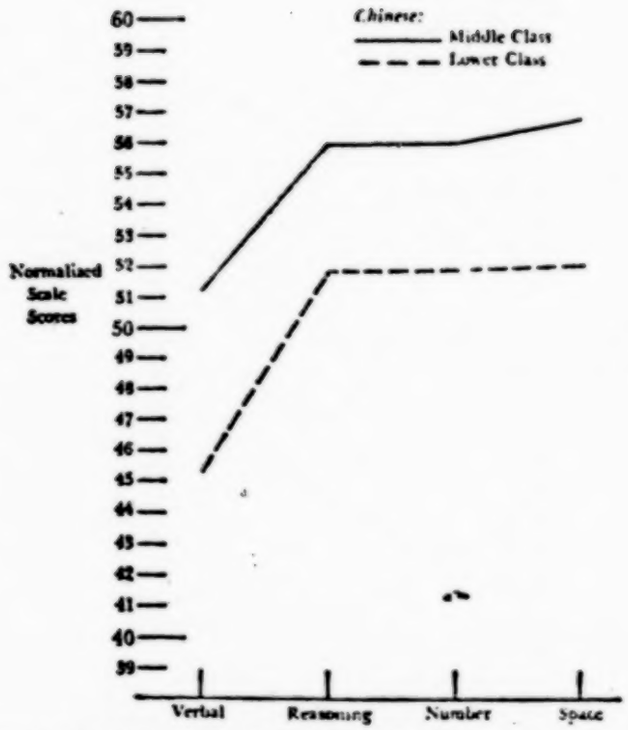

Fig. 2. *Patterns of Normalized Mental-Ability Scores for Middle- and Lower-Class Chinese Children.*

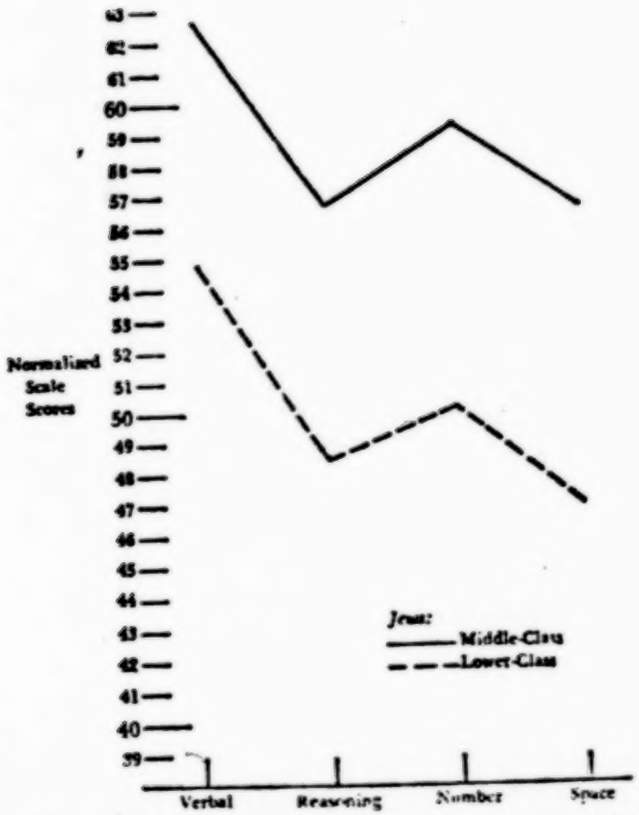

Fig. 3. *Patterns of Normalized Mental-Ability Scores for Middle- and Lower-Class Jewish Children.*

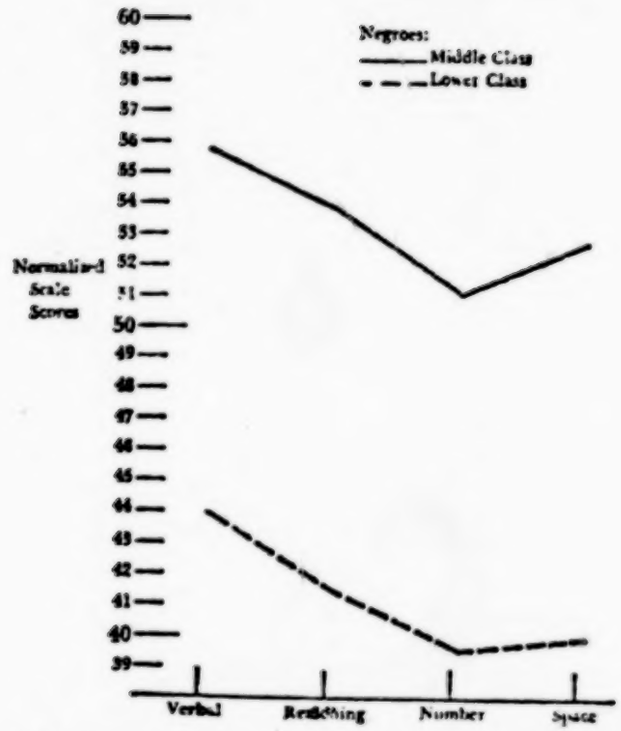

Fig. 4. *Patterns of Normalized Mental-Ability Scores for Middle- and Lower-Class Negro Children*

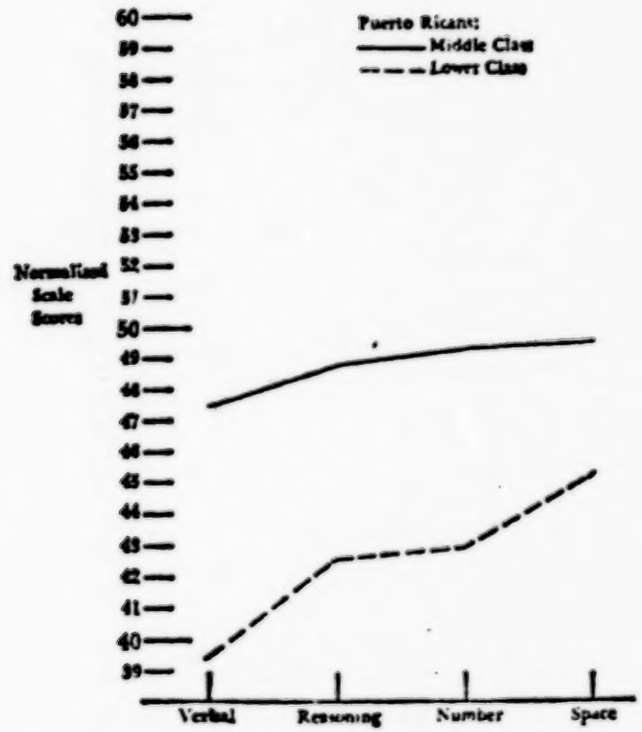

Fig. 5. *Patterns of Normalized Mental-Ability Scores for Middle- and Lower-Class Puerto Rican Children.*

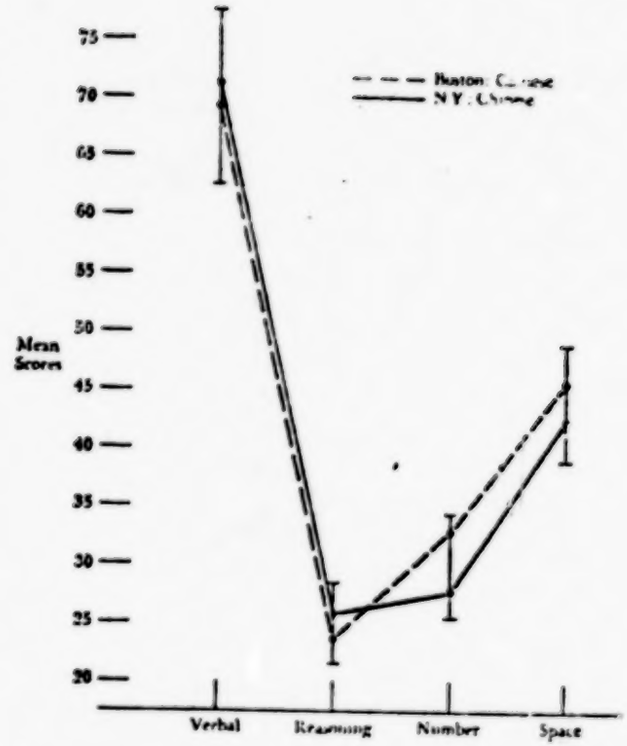

Fig. 6. *Mean Mental Ability Scores for* Chinese *Children in Boston (N = 20) and New York (N = 80).*

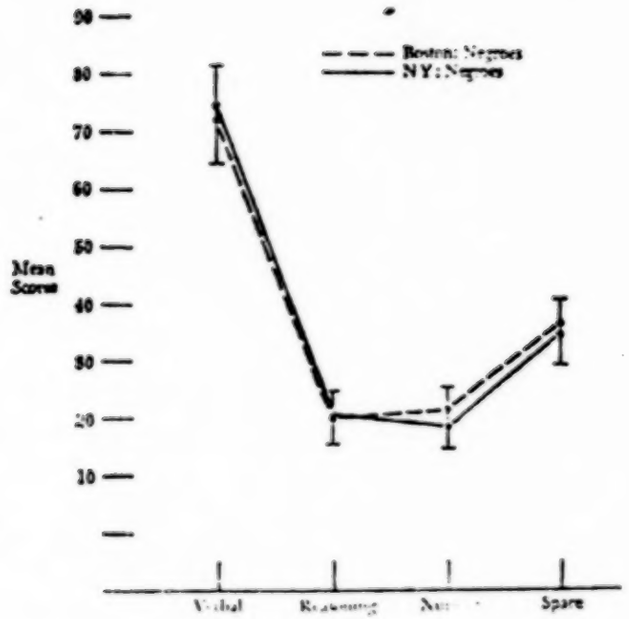

Fig. 7. ***Mean Mental Ability Scores for Negro Children in Boston (N = 20) and New York (N = 89).***

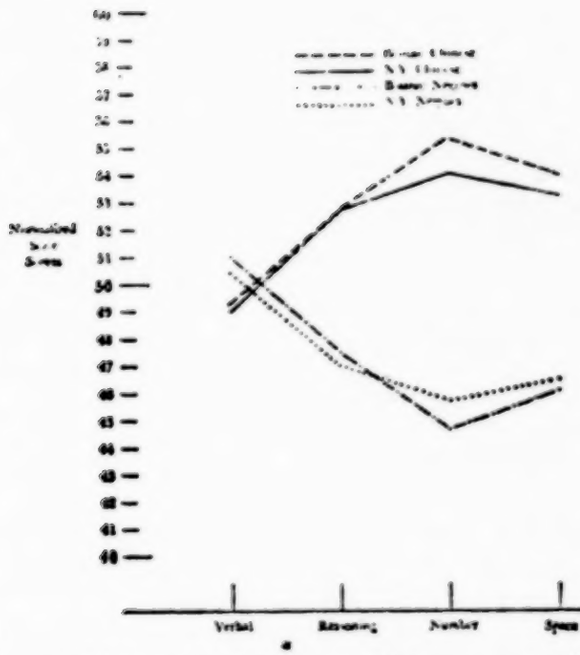

Fig. 8. ***Patterns of Mental Ability for Chinese and Negro Children: NY vs. Boston.***

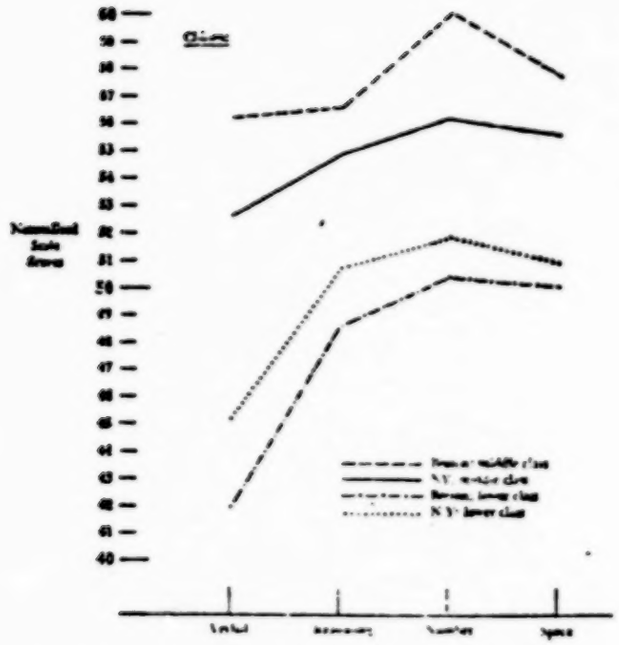

Fig. 9. *Patterns of Mental Ability for Chinese Children; Middle- and Lower-Class, NY vs. Boston.*

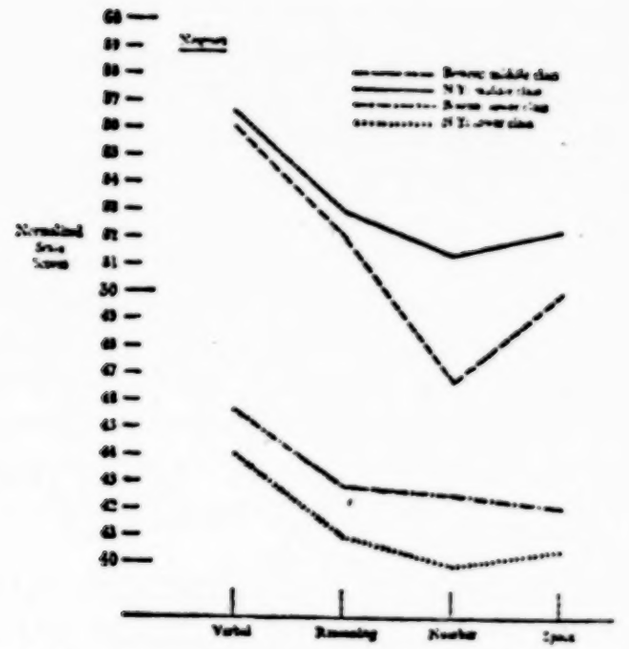

Fig. 10. *Patterns of Mental Ability for Negro Children; Middle- and Lower-Class, NY vs. Boston.*

Are equalization and diversification necessarily incompatible goals? We do not believe so. If accelerating the feasible gains in jobs, education, and housing of lower-class families accelerates the gains in intellectual development of their children and reduces the difference in intellectual performance between social-class groups, we can all agree on the desirability of this outcome. On the other hand, if recognizing the particular patterns of intellectual strengths and weaknesses of various ethnic groups and maximizing the potential power of these patterns by matching instructional conditions to them makes the intellectual accomplishments of different ethnic groups more diverse, we can all accept this gain in pluralism within our society. Thus, if lower-class children now perform intellectually more poorly than middle-class children—and it is clear that they do—and lower-class status can be diluted or removed by a society truly dedicated to doing so, this gain in equalization seems to be one legitimate aim of education. If the maximum educational promotion of particular patterns of ability accentuates the diverse contributions of different ethnic groups, this gain in pluralism seems another legitimate aim of education.

Our main point is that the study of mental abilities suggests that there may be patterns of attributes (cognitive, personality, motivational, and so forth) which are related in some regular way to ethnic-group membership. School-based research has not as yet identified the particular patterns of attributes that are educationally important and which (when matched with the appropriate instructional strategies) will maximize school achievement. Thus, we do not yet know if attribute patterns associated with ethnic-group membership will, in fact, be identified as educationally important. We believe, however, that data such as those derived from the current mental-abilities study must be considered since their implications may in fact require revisions of Coleman's position. We raise the issue because we are committed to our program of school-based research; whether ethnic-group differences are in fact minimized, held constant, or inflated by the programs which match individual differences to instructional strategies, we believe it important to pursue these programs nonetheless.

Perhaps this position asks no more than to change what is bad and changeable in education and society (resulting perhaps in greater equalization) and to use maximally what is good in education and society (resulting perhaps in increased diversity). Logic—and the empirical evidence—endorses both conclusions.

Intervenor's Exhibit 3

In The
UNITED STATES DISTRICT COURT
For The
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

* * * * *

AFFIDAVIT OF WILLIAM J. SIMMONS, PRESIDENT OF THE SOUTHERN INDEPENDENT SCHOOL ASSOCIATION, APPLICANT FOR INTERVENTION

CITY OF JACKSON)
STATE OF MISSISSIPPI) ss:

WILLIAM J. SIMMONS, being duly sworn, deposes and says:

1. I am the President of the Southern Independent School Association (SISA) chartered as a nonprofit Georgia corporation for the purpose of improving the academic standards and educational facilities of the more than 300 private schools associated in its component state private school associations in Virginia, North Carolina, South Carolina, Mississippi, Alabama and Louisiana.

2. Although SISA has no charter restriction against membership of state private school associations which may themselves be composed of open or closed admission member private schools and having student bodies not limited to any particular creed, sex or ethnic group, nevertheless, a majority of the private schools represented by SISA do limit admission to white students and teach under a curriculum designed to meet their particular educational capacities. Moreover, SISA has a policy of supporting the absolute right of each private school to determine for itself in each

case what admission requirements will be adopted, and its present application is in support of that policy.

3. SISA applies to intervene as a party defendant both as to itself, as representative of the approximately 175,000 pupils presently enrolled in such State association schools and their partents; and also as representative of the class of all similarly situated privately supported schools in the United States using admission criteria based on the race, religion, sex or national origin of the student body. I append a sample list of such educational organizations randomly selected from the more than 33,000 recognized as tax exempt by the Internal Revenue Service. On information received from the Department of Health, Education and Welfare there are at least 18,000 private elementary and secondary schools in the United States, of which a majority are indicated as having admission limitations or priorities based on some constitutionally significant classification.

4. On information and belief, the substantial majority of all parents who have enrolled their children in the private schools represented by SISA are citizens of the United States in which they reside, are taxpayers who contribute through federal, state and local taxes for the support of public education without rebate, assistance or subsidy for the additional payments they are required to make for the support of their children in these private schools.

5. On information and belief, the schools represented by this Association are on the average educationally advanced from one to two years over public schools in their area as measured by nationally standardized tests, notwithstanding that the per pupil capital and operating costs of such private schools are believed to be small fractions of comparable costs in the public schools. In the opinion of the Association, its directors and educational consultants,

this accomplishment is directly and causally related to the increased homogeneity of the student bodies which admission restrictions make possible. Moreover, because of their private nature, these schools are also enabled to maintain traditional religious and patriotic observations of a type which have been eliminated from the public school systems of the country but are regarded by private school parents as being of significant value.

6. An adverse determination of the issue of law posited by the pleadings herein would directly prejudice the continued viability of all such schools and deprive the parents concerned of their constitutional right of association to express themselves in the education of their children in a manner consistent with their beliefs.

7. Any adverse disposition of this action would as a practical matter impair and impede the ability of SISA and the schools it represents to protect these interests of the parents and children concerned. Because of the greater diversity and geographical scope of applicant's activities, its interest cannot be adequately represented soleiy by the particular facts applicable to the existing defendant.

Sworn to before me this 11th
day of June, 1973

/s/ William J. Simmons

/s/ Yvonne D. Williams
Notary Public

My Commission Expires June 11, 1975.

RANDOM EXAMPLES FROM INTERNAL REVENUE SERVICE LISTING OF 33,000 PRIVATE, NON-PROFIT EDUCATIONAL INSTITUTIONS SHOWING CONSTITUTIONALLY SIGNIFICANT LIMITATIONS ON ADMISSION OR SERVICE

A. Race:

1. American Indian

All Tribes Indian School, Bernadillo, New Mexico
Christian Indian School, Sedona, Arizona
American Indian Educational Foundation, New York, N.Y.
Faris Educational Fund of the Jicarilla Apache Tribe of New Mexico, Albuquerque, N.M.
American Indian Children's Home, Schell City, Mo.
Wisconsin Indian Scholarship Council, Inc., Madison, Wisconsin
Zuni Christian Reformed Mission School, Zuni, N.M.

2. Chinese

Chinese Public School, Stockton, Calif.
Waianae Chinese School, Waianae Oahu, Hawauu
Wahiawa Wah Mun Chinese School, Wahiawa, Hawaii
Chung Shan School, Honolulu, Hawaii

3. Japanese

Wahiawa Japanese Holiness Church Schools, Wahiawa Oahu, Hawaii
Japanese Scholarship Foundation, Westfield, N.J.
Shonien (Japanese Children's Home), Los Angeles, Calif.

4. Mexican

Wichita Falls Mexican Community Day Nursery, Wichita Falls, Texas
Mexican American Educational Association, Sacramento, Calif.
Mexican Bible Seminary, Nogales, Arizona

5. Negro

African Christian Schools Foundation, Inc., Nashville, Tenn.
American Council on Negro Education, Brooklyn, N.Y.
Associates in Negro Folk Education, Washington, D.C.
Bethune (Mary McLeod) Day Nursery, Corpus Christi, Texas
Booker T. Washington and Franklin Normal Industrial and Academic School, Inc., Rocky Mount, Va.
Columbia Negro Nursery School, Columbia, Mo.

Educational Foundation of the National Council of Negro Women, Inc., Washington, D.C.
The Greater Middletown Negro Youth Scholarship Fund, Middletown, Connecticut
Harlem Preparatory School, New York, N.Y.
Harriet Tubman High School, Simpsonville, Md.
Martin L. King Scholarship Fund of Florida, Gainesville, Fla.
Palmer Memorial Institute, Sedalia, N.C.
Voorhees High School, Denmark. S.C.
Winter Park Day Nursery Assocation for Colored Children, Winter Park, Fla.

B. National Origin:

1. Bohemian

Bohemian School "Jan Nerida", Chicago, Ill.
Bohemian School Jan Amos Komensky at Winfield, Long Island, Winfield, N.Y.

2. Croatian

Croatian Board of Trade Scholarship Fund, Detroit, Mich.

3. Czech

Czech Free School of New York, New York, N.Y.
Czech Educational Foundation, College Station, Texas

4. French

French American School of Chicago, Chicago, Ill.
French American Bilingual School, San Francisco, Calif.
Ecole Maternelle Francais, New York, N.Y.

5. German

German Language School of Children, Seattle, Wash.
German School of the East Bay, Oakland, Calif.
German School of the Mid-Peninsula, Redwood City, Calif.
German-American School Association, New York, N.Y.
German-American School Association of Southern California, Los Angeles, Calif.
German School Association and Free Community, St. Louis, Mo.

6. Greek

Greek Children's Care, New York, N.Y.
Greek Community School of Highlandtown, Baltimore, Md.

7. Irish

Irish Scholarship Foundation, Providence, R.I.

8. Polish

Polish American Scholarship Fund, Chicago, Ill.
Polish Bible Students Association, Chicago, Ill.
Polish Manual Training School for Boys, Niles, Ill.

9. Russian

Russian Student Fund, New York, N.Y.

10. Ukrainian

Ukrainian Student Fund, New York, N.Y.

C. Creed

1. Bible

Capital Bible Training School, Salem, Oregon
Frontier School of the Bible, La Grange Wyoming
Faith Bible Academy, Camdenton, Mo.
Week-Day School of Religious Education, Coronado, Calif.

2. Hebrew

Akiva Hebrew Day School (Yeshivat Akiva), Detroit, Mich.
Adath Israel Nursery School, Woodbridge, N.J.
Bialek School of the Flatbush Jewish Center, Brooklyn, N.Y.
Beth Sholom Kindergarten, Columbia, S.C.
Beth El Hebrew School, Dorechester, Mass.
Columbus Torah School, Columbus, Ohio
First Hebrew Day Nursery, Brooklyn, N.Y.
Fall River Hebrew School, Fall River, Mass.
West Coast Talmudical Seminary, Los Angeles, Calif.

3. Mennonite

Alden Mennonite School, Marilla, N.Y.
Amish-Mennonite School, Montezuma, Ga.
Franconia Mennonite Day School, Souderton, Pa.

D. Sex

1. Boys

Ferris School for Boys, Wilminton, Del.
Chaddock Boys School, Quincy, Ill.
Catalina Island School for Boys, Santa Catalina Island, Calif.

Anson Boys School, Marshalltown, Iowa
Academy for Boys, Albuquerque, N.M.

2. Girls

Westlake School for Girls, Los Angeles, Calif.
Andrews School for Girls, Willoughby, Ohio
Albany Academy for Girls, Albany, N.Y.
Beth Jacob-Beth Miriam School for Girls, Bronx, N.Y.
Barnard School for Girls, Inc., New York, N.Y.

E. Mental and Physical Characteristics

1. Exceptional

Fuller School for Exceptional Children, Fayetteville, N.C.
Carroll County Exceptional Children Organization, Delphi, Ind.
Christ Child School for Exceptional Children, St. Paul, Minn.
Chelmsford Nursery for Exceptional Children, Chelmsford, Mass.

2. Retarded

Lucinda Weeks School for Handicapped Children, San Francisco, Calif.
Arizona School for Retarded Children, Phoenix, Arizona
Brooklyn Hebrew School for Retarded Children, Brooklyn, N.Y.
Boston Speech School for Crippled Children, Inc., Boston, Mass.
Chicago School for Retarded Children, Chicago, Ill.

3. Handicapped

a. Blind

Clovernook School for the Blind, Cincinnati, Ohio
Boston Nursery for Blind Babies, Boston, Mass.
Wisconsin School for the Visually Handicapped, Jamesville, Wisc.

b. Cerebral Palsy

Cerebral Palsy Nursery School, Lexington, Ky.
Cerebral Palsy Preschool Center, Nashville, Tenn.
Cerebral Palsy School, Louisville, Ky.

c. Deaf

Beverly School for the Deaf, Beverly, Mass.
Central New York School for the Deaf, Rome, N.Y.

Gastonia Oral School for Hearing Impaired Children, Gastonia, N.C.
American School at Hartford for the Deaf, Hartford, Conn.

F. Limited to Small Group

Department of Justice Scholarship Fund, Washington, D.C.
Derrickmen's Apprentice Educational Fund, Local 197, New York, N.Y.
Educational Fund for Children of Phillips Petroleum Company Employees, New York, N.Y.
Educational Fund for War Foster Children, Glencoe, Ill.
War Orphans Scholarships, Inc., New York, N.Y.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

COLIN M. GONZALES, *et al*, *Plaintiffs*, v. FAIRFAX-BREWSTER SCHOOL, INC., *Defendant*.	)	**CIVIL ACTION NO. 494-72-A**
MICHAEL C. McCRARY, *et al*, *Plaintiffs*, v. RUSSELL L. RUNYON, *et al*, dba BOBBE'S SCHOOL, *Defendants*, and SOUTHERN INDEPENDENT SCHOOL ASSOCIATION, *Intervenor-Defendant*.	)	**CIVIL ACTION NO.495-72-A**

TRIAL PROCEEDINGS

Alexandria, Virginia
July 16, 1973

Before HONORABLE ALBERT V. BRYAN, JR.,
United States District Judge.

Appearances:

ALLISON W. BROWN, JR., ESQ.,
and
ROBERT M. ALEXANDER, ESQ.,
Attorneys for the Plaintiffs.

Attorneys for Defendants in
Civil Action No. 494-72-A

McDONALD & NEWTON, ESQS.,
BY: WESLEY E. McDONALD, ESQ., of Counsel,
B. AUSTIN NEWTON, JR., ESQ., of Counsel,
and
ANDREW A. LIPSCOMB, ESQ.

Attorneys for Defendants in
Civil Action No. 495-72-A

VAROUTSOS, KOUTOULAKOS, ARTHUR &
HILTON, ESQS.,
BY: LOUIS KOUTOULAKOS, ESQ., of Counsel.

Attorneys for Defendant-Intervenor in
Civil Action No. 495-72-A

LEONARD, CLAMMER & FLUES, ESQS.,
BY: GEORGE STEPHEN LEONARD, ESQ.,
of Counsel.
EDITH D. HAKOLA, ESQ., of Counsel.

Whereupon,

MARGARET R. GONZALES,

called as a witness by and on her own behalf, having been first duly sworn, was examined and testified as follows:

MR. BROWN: Your Honor, I would like to introduce at this time the various answers to interrogatories–the interrogatories and answers to interrogatories that were–interrogatories of the plaintiffs and the answers thereto of the defendants in this case; have them introduced as evidence.

I would also like to introduce as evidence the exhibits which were amrked, and have been marked in the file of the case, as Plaintiffs' Exhibits 1, 2, 3 and 4.

THE COURT: All right.

MR. BROWN: I would also like to call attention to the fact that there have been certain stipulations entered into that are in the file also.

THE COURT: They are already part of the record.

DIRECT EXAMINATION

BY MR. BROWN:

Q. Will you state your name, please. A. Margaret R. Gonzales.

Q. And where do you live? A. 4507 Hendricks Drive, Dale City.

Q. Are you employed, Mrs. Gonzales? A. Yes, I am.

Q. Where are you employed? A. Howard University, College of Medicine.

Q. And what do you do there? A. I am a medical steno-clerk

* * * * *

8 Q. How long have you lived at your present address? A. A little over a month now.

Q. Where did you live previously? A. 6030 Vista Drive, Falls Church, Virginia.

* * * * *

Q. You have a son named Colin Gonzales? A. Yes, I do.

Q. What is his age? A. He's nine.

Q. What was the date of his birth? A. October 8, 1963.

Q. What is his race? A. He's black.

Q. Did there come a time when you learned of a school known as Fairfax-Brewster School? A. Yes.

9 Q. How did you learn of the school? A. Through the yellow pages. I saw an ad in the yellow pages.

* * * * *

Q. You mean by that, the classified – A. Right.

Q. – phone directory? A. Yes, as well as receiving advertising, you know, advertising in the mail.

Q. Were you sent an advertisiement in the mail? A. Yes.

Q. Was it addressed – A. Addressed to "Resident, 6030 Vista Drive."

Q. Have you every heard of the school through friends or neighbors or – A. Yes, I did.

Q. What were those circumstances? How did that happen? A. A friend I worked with had a son who attended the summer camp with Fairfax-Brewster.

Q. Did there come a time when you sought to enroll Colin in Fairfax-Brewster School? A. Yes, I did.

Q. When was that? A. This was in the spring of 1969.

10 Q. And how old was Colin then? A. He was five, five and a half.

Q. Why did you choose the Fairfax-Brewster School? A. Because it was in an area convenient to where we lived.

Q. About how far was that? A. I'd say about a five-minute walk, five to ten-minute walk from where we lived.

Q. When you contacted the school, you say, in the spring of 1969, what was your purpose in contacting it? A. Of having Colin enrolled–having him attend summer camp and to continue school in the fall.

Q. Did you then contact the Fairfax-Brewster School? A. Yes, I did.

Q. Do you know who you spoke to? A. No.

Q. And what happened? A. Well, I contacted the school and I was informed of what was required for Colin to attend the school, and I was told that–well, you know, he'd need a medical certificate and, of course, an application form would be required to be filled out, and I think I was also informed of the tuition fees for this school.

11 Q. Did you ever visit the school? A. Yes, I did.

Q. How did that come about? A. We visited the school. I think it was after – You know, after having all these things ready, we visited the school with Colin. That's my husband, myself and Colin. We visited the school.

Q. What is your husband's name? A. Raymond Gonzales.

Q. Well, had you made the arrangements to visit the school by telephone? A. Yes. An appointment date was set up that we would come into the school.

Q. Now, do you remember just about when this was? Could you specify it more clearly? A. It must have been sometime in early May.

Q. Early May? A. Uh-huh.

Q. What year? A. 1969.

Q. Would you describe what happened when you visited the school? A. Well, my husband, Colin and myself, we went over to the school sometime in the morning, and at the time the school was in session and
12 we – we were invited to visit the classrooms, and I remember getting to the kindergarten classroom and there was a class in session there and at the time they must have been in the process of learning the time and I remember, you know, asking Colin, you know, if he knew – if he knew what time they wanted, because he had already had an idea of time from the nursery school that he was attending.

We were shown the play area an, you know, the lunch, you know – well, where the kids eat their lunch in the classroom, and things like that, and then we came out to the office and sat there for a while. We spoke to someone in the office who informed us that, you know, they'd get in touch with us, I guess, with the intent of letting us know whether Colin was accepted at the school.

Q. Who did you speak to in the office? A. I don't know the name of the person at the time. It was – a female employee.

Q. Were you escorted around the school? A. Yes, we were.

Q. By that same person? A. No. We – we were escorted around by someone else and – well, they, of course, left us in the office and the employee in the office informed us, you know, that they would get in touch with us.

Q. Did the person who escroted you around – was
13 that person a man or a woman? A. A woman.

Q. When you visited around and were shown around the school, was it your intention – what grade were you aiming for? I mean, what – was Colin going to go into kindergarten or go into first grade? A. Well, first of all, I'd like to explain that my whole idea was to get Colin into the camp so that he could, you know, continue school in the fall. It was so that he would, you know, get accustomed to the environment, and so on. So, the main idea was to get him into summer school and to continue school in the fall.

Q. Into summer what? A. Into summer camp, you know, and continue school in the fall; and at the time it was – you know, it was my impression that Colin would go into the first grade because he was eligible for the first grade, having already gone through kindergarten at the school he was attending.

Q. What was the school he had attended? A. Crossroads Day Nursery and Kindergarten.

Q. Where was that located? A. At Bailey's Crossroads.

Q. When you were shown around the school, what was Colin's reaction? A. He was quite impressed because
14 there was a little boy attending there at the time who he had already knew from Crossroads Day Nursery.

Q. Was he –

What other things –

You say he was impressed.

What – A. He was excited, you know, about the facilities that they had offered for recreation, like, you know, like whatever he saw on the outside for the kids.

Q. When you visited the school, was any indication given to you that Colin was qualified or that he was not

qualified? A. No, none whatsoever.

Q. So you weren't given any idea as to whether he would be accepted – A. No.

Q. – for enrollment, – A. No.

Q. – really, one way or the other? A. No.

Q. When Colin had gone to this previous school, had there been any adverse reports or had he done all right at the kindergarten? A. Ok, yes, he had.

Q. Did you – when did you – or did you fill out
15 application forms? A. Yes, we did.

Q. When was that? A. I don't remember clearly – exactly when the application form was filled out, but I know that we submitted an application form with a check to Fairfax-Brewster School.

* * * * *

Q. What was the check for? Was that for the first tuition payment? A. It was –

No, no, no. It was a registration check that was required at the time, you know, in an application form submitted.

* * * * *

16 Q. What were the things that you submitted to the Fairfax-Brewster School? A. An application form, a check for registration and medical records.

THE COURT: I didn't understand whether you took that with you on the visit or whether you submitted it previous to the visit or whether you submitted it after the visit.

THE WITNESS: It's not quite clear if I had submitted it previously or if I had submitted it on the day that we had visited the school. I'm not quite sure.

16 BY MR. BROWN:

Q. Well, did you submit it after you went to the school or did you – A. No, no, no, no time after. It – it – it was before we went to the schook but I'm not quite sure if it was submitted the day we actually visited the school or if it was submitted before the visit.

Q. Had you taken Colin to a doctor for a physical examination for the purpose of entering him in this school? A. Yes, we did.

17 Q. I mean, you say you had a medical form. A. Yes. We had to have – take him to a doctor, you know, to be able to get the medical certificate to present to the school.

Q. Was this the first school you had applied to? A. Yes, it was the first school.

Q. That spring? A. Yes.

Q. When did you learn, and under what circumstances, what had happened to your application for enrollment? A. When we received some correspondence in the mail from Fairfax-Brewster, stating that they weren't able to accept our application at this time, and the check was returned along with the medical records.

Q. Was any reason stated in the correspondence? A. No. It just said that, you know, they were unable to accept our application at this time.

Q. What happened then? A. My husband got in touch with Fairfax-Brewster and he spoke to someone there, you know, in reference as to why our check was returned and what was the reason for returning our check.

Q. What did your husband tell you about the problem? Did you learn then that Colin was going to be able to
18 attend the school or that he was not going to be able to attend school? A. No. I learned then that he was not going to be able to attend school.

Q. What did you or your husband do then, or did you discuss this with your husband? I mean, did you discuss his rejection with your husband? A. Yes, I did.

Q. What did you decide to do then? A. Well, at the time we were – we were quite upset and distressed about, you know, being refused, our application being turned down at this school, and I knew my husband was very angry and he called – and he called the HEW to find out, you know, exactly, you know, what could we do in a situation like this, because it's the first time we had every been, you know, confronted with this type of a situation, and I – I was very upset. I couldn't – you know, I couldn't possibly believe that, I mean, you know, at this –

Q. Did you contact another school? A. Yeah, we – we contacted another school.

Q. What other schools did you contact? A. The next school we contacted was Bobbe's School.

19 Q. Where is it located? A. It's located in Falls Church, Fairfax County, also near the Bailey's Crossroads.

Q. I'm sorry, I didn't understand you. Fairfax County what? A. It's on – well, it's near Bailey's Crossroads. I don't remember the address.

Q. Is it located near where you lived? A. Well, it was convenient to where we lived also.

* * * * *

Did Colin attend Bobbe's School that year? A. He was not accepted at Bobbe's.

Q. What did you do then? A. We called one more – we called one more school, and that was Congressional Preparatory School, and he was accepted immediately at Congressional.

Q. Where is Congressional School? A. It's on Sleepy Hollow Road in Falls Church, Virginia.

Q. Is it farther from where you lived? A. Oh, yes, it was farther. He – Yes, it was farther.

* * * * *

20 Q. What did Colin do that summer? A. Well, we enrolled him in the camp and he continued school there in the fall.

Q. At Congressional? A. At Congressional.

Q. How long did he attend Congressional School?

A. For two years.

Q. Did he go to the Congressional camp the following summer, that is, the summer – A. No.

Q. – of 1970? A. No. We went to Trinidad on a vacation.

Q. In the two years that Colin was at –

THE COURT: Let me find –

What grade did he go into at Congressional?

THE WITNESS: First grade.

THE COURT: First grade.

BY MR. BROWN:

Q. In that first grade, Mrs. Gonzales, how was Colin's performance? A. He did very well in first grade. He had no problems.

Q. Did you have consultations from time to time –

A. Oh, yes.

21 Q. – with teachers? A. Yes.

Q. You went to parent-teacher meetings? A. Right. I did.

Q. And did you discuss how he was performing with the teachers? A. Oh, yes, yes.

Q. Did you get any adverse reports about his behavior?

A. No, none whatsoever.

Q. Did he learn that year the things that children normally learn in the first grade? A. Oh, yes, he did.

Q. Such as reading – A. Reading, writing.

Q. Writing.

After the two years that he attended Congressional, where did he go? A. He attended St. Anthony's in Falls Church – St. Anthony's Elementary School in Falls Church.

Q. What kind of a school is that? A. A parochial school.

Q. Where is that located? A. On Glen Carlyn Drive in Falls Church, Virginia.

Q. And he went there three years – two years.

22 Excuse me. A. Two years.

Q. And how did he perform at that school? A. He did very well.

Q. So he's now completed four years of school? A. Yes.

Q. He's finished the fourth grade; is that correct?

A. Yes, he has.

Q. And then you moved – A. Right.

Q. – a month or so ago?

* * * * *

Q. Where will he go to school this coming year? A. He's now attending Minneville in Prince William County.

* * * * *

Q. Where is that located? A. In Dale City.

23 Q. That's where you reside now? A. Yes.

Q. Is Congressional School farther from where you used to reside than Fairfax-Brewster School? A. Yes, it is.

Q. How did Colin go to Congressional School? A. By bus.

Q. And how did he return? A. By bus.

Q. Did Colin have any friends who attended Fairfax-Brewster School in 1969 or 1970? A. There was a little boy who lived next door who attended the summer camp at Fairfax-Brewster who's a friend of his.

Q. Do you know the name of that summer camp?

A. Safari, I think it's referred to as.

Q. Safari what? A. Safari Day Camp.

Q. Was Colin interested in attending that camp? A. Oh, yes. He was quite excited because his friend next door was going and he was quite acquainted with, you know, the colorful busses and everything, and he looked forward, you know, going to the camp; and, in fact, we had spoken a whole lot about it, you know, that he would attend the camp in the summer and, you know, go to school in the fall.

24 Q. How was he acquainted with the colorful busses, as you put it? A. Well, next door, the bus – the little boy who lived next door, he traveled the bus to the day camp, so –

Q. Were they just yellow school busses? A. No, no, no. They had like, you know, tiger stripes, or something like that, on the school busses.

Q. Was that to convey a theme of some sort? A. I guess so. A safari effect, I imagine.

Q. Did you inform Colin –

Well, you have testified that you took Colin to the Fairfax-Brewster School, and then a short time later you were told that he was rejected, and you testified that he was excited and interested in going to the school or impressed. A. Yes.

* * * * *

25 Q. Did you inform Colin of the reason that he was unable to attend Fairfax-Brewster School? A. Yes, I did.

Q. What did you tell him?

How did you explain it to him, in other words? A. Well, I tried to explain to him that he was not accepted at the school because he was black.

* * * * *

Q. Could you describe the kind of conversation you had with him – A. Well, of course, this conversation –

26 Q. – or what you told him? A. I spoke to Colin. This was after me and his father had already contacted the school and was informed by them that Colin was not accepted, and it was following this that I tried to explain to Colin, you know, that he could not attend Fairfax-Brewster because, you know, his application – our application was rejected by the school on the basis that he was black.

Q. You think he understood what you were talking about? A. Well, this was – you know, this was quite new to him because, you know, it was the first experience we were having in this – in this situation. So, you know, it took soom explaining to him exactly why, you know, he could not go to the school.

Q. Was he disappointed? A. He was, definitely.

Q. Well now, you say this was the first experience you had of this sort. A. Yes.

Q. To get a little further information on that, you had indicated that you had lived in that area of Bailey's Crossroads neighborhood about five years or so – five or six years. A. Yes.

27 Q. Where did you live prior to that? A. Where did

I live prior –

Q. Prior to living in –

Well, prior to living in this area of Virginia, where did you live? A. Well, we – we came from Trinidad in the West Indies, and we lived in New York for a couple of months and then moved out here to the Falls Church area.

Q. Where was Colin born? A. Colin was born in Trinidad.

Q. Are you and your husband both natives of Trinidad? A. Yes, we are.

Q. Are you both citizens of Trinidad? A. Yes, we are.

Q. Had you personally encountered or had any particular exposure to racial discrimination in Trinidad?

A. No.

Q. In the time that you had lived in the United States, had you had any personal encounters with racial discrimination? A. No, none whatsoever.

Q. Well, how did you feel and how did you explain to Colin what had happened here?

28 How did you feel about this? A. Well, I was very very upset about it. I was angry. It was my first experience with this sort of thing and it was – you know, it was hard to relate to my child that – I mean, you know, that this type of thing existed. You know, it was just quite something I couldn't make myself believe at this time.

Q. Now, this happened in 1969.

Have you had experiences with racial discrimination since then? A. No, not at all.

* * * * *

29 Honor wishes, –

THE COURT: I see no –

MR. BROWN: – I can examine her on that now.

THE COURT: As long as she's on the stand, she might as well testify to whatever she would testify to in both cases.

MR. McDONALD: Your Honor, there is a witness in the room that I did not ask a rule for, but I think, before we go further, we ought to ask for a rule on the witnesses.

THE COURT: It is a little late for that, Mr. McDonald.

MR. McDONALD: Sir?

THE COURT: It is a little late to ask for that.

MR. McDONALD: Well, it may be effective from here on. We just had our first witness up here.

30 THE COURT: All right.

Will all of the witnesses in the case please stand.

MR. LEONARD: Your Honor, on behalf of the intervenor's witnesses who come from out of town, on matters not concerned with the two other schools, I respectfully except to that. I don't believe they should be excluded from the courtroom at the present time.

MR. McDONALD: All right.

THE COURT: Well, it is going to be hard to separate –

MR. McDONALD: We withdraw it in the light of Mr. Leonard's comments.

THE COURT: All right.

MR. ALEXANDER: We wish not to invoke the rule.

THE COURT: All right.

Suppose, Mr. Brown, you go ahead and examine the witnesses on the other case, too.

I don't see how we are going to keep them separate, Mr. McDonald.

MR. McDONALD: It is perfectly all right, Your Honor. I think what we are doing is the only way we can do it.

31 BY MR. BROWN:

Q. I just have one further question, Mrs. Gonzales, about the Fairfax-Brewster School.

What were the hours of the school? A. Well, from what I understood from the school, they offered, you know, baby-sitting facilities whereby a working mother could leave her child there, you know, sometime before the normal school hours and pick him up sometime after the normal school hours, and this was one of the reasons that I was interested in Fairfax-Brewster as well, because this would be very convenient for me.

Q. Because you worked? A. Yes.

MR. BROWN: Your Honor, if I might interrupt a moment.

Because we are now, in effect, moving into the other case, namely, McCrary versus Bobbe's Private School, I would like to formally introduce at this time the interrogatories–plaintiffs' interrogatories–the answers thereto, and the exhibits that were attached thereto, as well as the stipulations that have been entered into in that case.

THE COURT: All right, sir.

Any objection, Mr. Koutoulakos?

32 MR. KOUTOULAKOS: I have no objection.

THE COURT: All right. They will be received in evidence, and they have been received in evidence in the Fairfax-Brewster School case.

MR. BROWN: In the Bobbe School?

THE COURT: Yes, but I don't know that I actually admitted the others into evidence, but they are admitted into evidence in both cases.

* * * * *

Q. Now, Mrs. Gonzales, you have testified that after Colin was rejected by the Fairfax-Brewster School, you thought about alternative schools that he could attend.
A. Right.

Q. Was one of the schools that you considered a school known as Bobbe's Private School? A. Yes.

Q. How had you learned about Bobbe's Private School? Do you know?

* * * * *

33 THE WITNESS: There was an ad in the yellow pages and seeing that it was, you know, convenient to where we were living –

BY MR. BROWN:

Q. Excuse me just a second.

You say there was an ad in the yellow pages? A. In the yellow pages.

Q. You mean the classified telephone directory? A. The classified telephone yellow pages.

Q. Yes. A. And since this school was also very convenient to where we lived, that I thought, you know, this was the next school that I'd contact.

Q. Had you every known anyone who had gone there or – A. Another friend I worked with, her son attended school at Bobbe's.

Q. Is that so?

Where did you work at that time? A. At Security National Bank in the Culmore Shopping Center.

Q. In other words, you testified earlier that at the present time you work at Howard University.

34 How long have you worked at Howard? A. Just about a year.

Q. And prior to that, you worked at Security National Bank in – A. Well, I worked at Security National

Bank from 1968 to '69.

Q. What kind of work did you do there? A. I was a bookkeeper.

Q. And you say that you had a co-worker whose – person you worked with – A. Right.

Q. – whose child went to Bobbe's? A. Yes, yes.

Q. Had she informed you about the school? A. Well, I told her that, you know, I had intended, you know, getting Colin into school, and she suggested, "Well, why not call Bobbe's? My little boy attends school there."

Q. Did Colin have any friends who attended Bobbe's? A. No, he didn't. No, he didn't know this little boy. He had no friends.

Q. Where is Bobbe's located in relation to your home? About how far away? A. I'd say about a five-minute drive.

* * * * *

35 Q. Could you give it in distance, roughly? A. Well, about a mile.

Q. Did there come a time –

Well, after Colin had been rejected by the Fairfax-Brewster School, would you describe what contact you then had with Bobbe's? A. Well, I didn't contact Bobbe's myself. My husband contacted – was the one who contacted the school.

Q. And how did he do that? A. By phone.

* * * * *

Q. Was he accepted or rejected at Bobbe's? A. He was rejected.

36 Q. Did you inform Colin that he had been rejected by Bobbe's School? A. Well, no. There was no

reason to.

Q. There was no reason to? A. No.

* * * * *

Her damages have been foreclosed by the Court's ruling, and I object to any testimony along those lines.

THE COURT: Unless it is one of the defendants, what is the purpose of this?

MR. BROWN: Well, what I am trying to show, Your Honor, is that the rejection, in these circumstances, has an effect on the son because it affects the whole family relationship, and that if she was upset and if her husband was upset and they discussed it with other people, that it created an emotional situation and couldn't help but affect a six-year-old child.

THE COURT: I think –

MR. KOUTOULAKOS: Your Honor, of course –

MR. BROWN: And whehter or not–in other words,

38 whether or not she discussed it directly with her child, it affects the marriage community and, therefore, the son.

THE COURT: Well, I think you can ask her whether this affected the marriage and the homelife, but what she discussed with other people, unless it can be shown that this affected Colin, I don't think is admissible.

MR. BROWN: Well –

THE COURT: And if the family situation was an upset situation, you can ask her that, but what she discussed with other people –

MR. BROWN: Well, if she was upset, it would be indicative of the degree of her upset, if she discussed it with other persons. It would be indicative of the kind of –

THE COURT: I think we can get to it quicker than you're going about it, Mr. Brown.

MR. KOUTOULAKOS: Your Honor, I have the same objection. I think her upset–and, of course, he's now told her what the line of questioning is he wants developed; but I object on the basis that it is immaterial whether she was upset or not.

THE COURT: Well, it is material if her being upset affected Colin, and I think you can ask her if her being upset affected Colin.

39 MR. KOUTOULAKOS: But there is no evidence. She said she never discussed it with Colin, and it is a little far-fetched at this stage. This happened in '69 and we are now in '73, and the family is still together. It is a little far-fetched to get into that area of philosophical damages.

THE COURT: Objection overruled.

BY MR. BROWN:

Q. Were you upset about Colin's rejection from Bobbe's School? A. Yes, I was.

Q. And did you and your husband discuss it? A. Yes, we did.

Q. Can you describe what happened or what effect it had in your family?

* * * * *

41 Q. Would you indicate, Mrs. Gonzales, how you think this experience of being rejected by these two schools affected Colin?

* * * * *

THE WITNESS: Colin was already –

We had already told Colin that – you know, the reasons why he was rejected from the Fairfax-Brewster School, and I don't clearly remember if he was aware that we were trying to get him into Bobbe's at the time,

but, you know, I think you know, he was quite conscious then that – I mean, I believe Colin, you know, realized that there was a difference as regards how others felt about him.

* * * * *

42 Q. How long after the rejection by Fairfax-Brewster and Bobbe's School did you make the inquiry–or your husband or whoever–I don't know–make the inquiry to Congressional School? A. Shortly after.

Q. And during that period there was – what did you do?

I mean, between the time that you were rejected and the time that he was accepted at Congressional, there was a period of what? A. It was a little over a month, because, you know, the whole idea was to know exactly where we would be getting him into school for the summer camp and, you know, continue school in the fall. So,

43 the whole idea was to have him, you know, settled somewhere in the summer and so that he would be, you know, quite used to his environment by the fall.

Q. Does Bobbe's Private School have a summer day camp? A. No, but they offered, you know, a type of baby-sitting facility.

Q. At that time? A. Yes.

Q. And when you say "baby-sitting," he wasn't exactly a baby. A. No, no, but I mean, you know, to be able to attend somewhere in an organized program.

Q. And you intended for him to go to that that summer? A. Yes, yes.

MR. BROWN: That's all.

CROSS–EXAMINATION

BY MR. McDONALD:

Q. Mrs. Gonzales, you told us on direct examination that you first went to this school, I think you said, in May or early June–correct me if my question is improper or wrong– and you went with your husband and your little boy to see about Fairfax-Brewster. Is that correct?

44 A. Right.

Q. Now, is it not a fact that back as early as May and June of 1968 certain material had been sent to you as a result of a telephone call concerning the school's admission requirements and other facts pertinent to admission there? A. Yes.

MR. BROWN: Objection.

I think you misspoke, Mr. McDonald.

I think he said 1968. You meant 1969.

MR. McDONALD: I am only taking it from your deposition.

She just answered, yes, she did have some material sent to her in '68.

MR. BROWN: Bet your pardon.

BY MR. McDONALD:

Q. Now, when you went to the school in '69, did you fix that date on your own, or was it in May –

A. Beg your pardon?

Q. Do you fix the date when you went back with your son and your husband to Fairfax-Brewster–was that in May or June of '69? A. It was May.

Q. Your complaint says that you and your child were

45 rejected in June.

Would that be the date or about the time you got the notice – A. Right.

– or letter advising you that he could not be accepted?

A. Right.

Q. All right.

Now, you have submitted to the Court certain material that you had from the school.

I ask you, is this tye type of application blank?

Do you recall getting that application blank from Fairfax-Brewster, which was made a part of the interrogatories in this case? A. It was something, you know, almost like this, yes.

Q. What does that say up there at the top? A. Fairfax-Brewster School, Enrollment Application and Contract, 1973 to '74.

Q. All right.

Now, was this application that was given up there to that school on that day - was that filled out completely?

A. Yes, it was.

46 Q. All right.

Now, I ask you, had you received this type of a brochure back in May of – A. Yes.

Q. – '68, when you called? A. I don't remember if I received one in '68, but I received one in '69.

Q. Well, did you call the school again before you went over in May of '69?

Did you call them again for more material? A. No, no, no, no.

Q. But they just sent it to you without any call?

A. Well, I had to contact them, you know, to be able to get some information about the school. So when I got, you know, what I received from them, it included one of these.

Q. Did you –

THE COURT: Is that marked as an exhibit so that the record will show what it is?

MR. McDONALD: Your Honor, that is not in there, but she said that – she testified in her deposition that she received a brochure from the school, and I asked her if she recalled receiving this, and she said she did but she didn't know whether she got it in '68 or '69.

47 THE COURT: I just wanted to make sure that the record shows what this is, and it won't unless you identify it.

MR. McDONALD: Well, we will identify it later.

THE COURT: Let's identify it now so we'll know what you're talking about when you say "this."

BY MR. McDONALD:

Q. Now, you say you don't know when you got it, but you do remember getting this piece of material from the school? A. Right

Q. Now, will you just tell us what it is.

Is it a pamphlet? And tell us what it says on the front of it by way of identification. A. "The Fairfax-Brewster School."

Q. All right. And it shows what there?

THE COURT: It speaks for itself.

* * * * *

48 MR. McDONALD: All right.

(The brochure was marked as Defendants' Exhibit No. 1 for identification.)

BY MR. McDONALD:

Q. Now, did you have occasion to read this brochure when you received it? A. Yes, I did.

Q. And with particular reference to the testing there and the evaluation, did it occur to you or did you not know from these that you had to have kindergarten training to get into the first grade? A. Yes, I was under that impression.

Q. And did you answer on your application, when it asked you there about school attended – previous school attended –

I showed you this, and I will show it to you again so that you will know what we are talking about. This

is from the exhibit –

THE COURT: What exhibit?

MR. McDONALD: That's taken from the interrogatories that's been admitted into evidence. It's a school application, enrollment application, which she's talked about, Your Honor.

All right?

49 THE WITNESS: Yes

MR. McDONALD: Wait a minute. I am waiting for the Judge. I didn't know whether the Judge –

Is it all right?

THE COURT: Go ahead.

MR. McDONALD: All right, sir.

BY MR. McDONALD:

Q. Can you see there where it says – A. "Previous School - - -" –

Q. "– Previous School Attended"?

Do you recall filling that out and giving the name of the school? A. I believe I did.

Q. Did you submit any reports supporting the application from this so-called Crossroads Nursery School when you sent the application? A. No.

Q. Any reports of the child's? A. No, I did not.

Q. Nothing, was there? A. No.

Q. Did you not note from here that they wanted reports from previous schools, the records from the previous schools? A. I don't remember clearly.

50 Q. All right.

Now, what type of a school was this Crossroads? A. It was a day-care center nursery and kindergarten as well.

Q. Now, you say "kindergarten."

Tell us, first, what type of a school was it? Was it

a school as we know schools? Was it in a private home, or what type of an operation was it? A. Well, the building, from the outside, seemed like a private home, but on the inside it was, you know, sort of remodeled as a day-care and kindergarten center.

Q. Did you ever go into the school? A. Yes. I was shown around the school when I first registered Colin there.

Q. And what evidence of teaching these kindergarten children did you see yourself in there? A. Beg your pardon?

Q. What evidence of teaching these children any techniques or educational work in the nature of kindergarten students did you see? A. Well, on the walls, you know, displayed, as you would see in the average kindergarten school, were charts of the things that children learn, you know, charts of the alphabet, drawings, you know, numerals, and things like that. In fact, while

51 Colin attended there, you know, every day he would come home with something that he learned from school.

Q. Had you ever been in a kindergarten school before Crossroads? A. Yes

Q. Where? A. In Trinidad.

Q. Was there any reason why you did not get from the Crossroads something pertaining to his grades or how his proficiency was at Crossroads to make it a part of this enrollment application? A. I never requested one, so there was no need to receive one.

Q. Now, you went over there that day with your husband and your little boy and you left your application and you left a check for $20, which was the enrolling fee; is that correct? A. Yeah. I don't remember exactly the amount of the check, but I left the check.

Q. But you left the check? A. Yeah.

Q. All right.

You told counsel you left a medical certificate.

Isn't it a fact that you didn't furnish a medical certi-
52 ficate for several days after that time? A. Beg your pardon?

Q. I say, you told Mr. Brown on direct examination that you left with them a medical certificate, along with his application – A. Yes.

Q. – and the check? A. Yes.

Q. I ask you now, Mrs. Gonzales, is it not a fact that you did not leave a medical certificate that day? A. I don't remember clearly if the medical certificate was submitted, you know, prior to the visit or at the time of the visit.

Q. My question is: Was one there? Did you take it or had one been submitted that day or prior to that day? A. Well, this – I don't remember clearly if I submitted it on the day I actually visited or if it was submitted prior to my visit. I'm not quite clear on that.

Q. Now, when you went over there and talked – you say you talked to a lady. I think you told Mr. Brown you talked to a female. A. Uh-huh.

Q. And what did she talk to you about? Was she there – did you think she was representing the school?
53 Was she there as a receptionist, or something? A. Yeah, I imagine she was, you know, concerning the school because –

Q. All right.

Now, when you talked to her, what did she tell you?

MR. McDONALD: Strike that please, Mr. Reporter.

BY MR. McDONALD:

Q. Did that lady tell you anything about your application? A. Well, she had accepted the application,

you know, as what was required to be presented to the school.

Q. Well, you say "accepted." You mean she took it from you? You handed it to her. She took it? A. Yes. Well, we handed the application over to her.

Q. I understand that.

Now, did she discuss any of the requirements of kindergarten education, or anything like that? A. No, she did not.

Q. Did she tell you, when you talked to her there, that the school had a policy of not taking Negroes? A. No, she did not.

Q. That was not even mentioned, was it? A. No,
54 no.

Q. And she showed you through the classrooms and around the yard? A. Yes.

Q. And you told us you were impressed with the school? A. Yes.

Q. All right.

Getting back to Crossroads, how long had your boy been going over to that so-called nursery school, day school? A. This would have been –

Let's see. It might have been April of '68, June of '69.

Q. All right. He had been in in June –

You mean he only started Crossroads in June? A. He stopped – you know, he left Crossroads in June of '69.

Q. Oh, I'm sorry. You misunderstood my question.

How long had he been going to Crossroads? A. About a year.

Q. Do you know whether or not the Crossroads gave out any reports showing to the parents – showing the
55 progress or attainments of the children that were there?

A. Yes, they did, on request.

Q. Did you ever get a report from them? A. Well, I didn't actually request one from them.

Q. Now, how long was it, after you were there with the application and viewed the premises, before you received this communication saying that the child was not acceptable? How long? A. It must have been a little over two weeks.

Q. Had you had any communication with them – A. No.

Q. – between the time you left the application – A. No.

Q. – and when you got the note? A. No.

Q. Do you know what the note said or the letter or the form, or whatever it was? A. On the form it indicated, you know, the enclosed check and the medical records was being returned and that the application was not acceptable at this time.

Q. All right.

Now, you told counsel that this refusal to accept had a great impact on this child from a nervous and emotional standpoint, didn't you? A. Uh-huh.

56 Q. And you went into detail to tell us just how it affected him.

Is it not a fact that the emotional and the upset condition you told us here today came from the impact that you and your husband put on that boy about the fact that he had been rejected? A. No, I'm afraid not. No.

Q. You believe that a boy, not even six years of age, could go into a trauma state, almost, or in a state of complete frustration and be terribly upset by the mere fact that he couldn't get in a certain little kindergarten somewhere? A. Yes, I'm sure my son was

at the time because he had already built up his – you know, his mind the idea that, to me, this is the school he would be going to attend.

He had been to the school. He had seen, you know, the kids there. He, I'm sure, was impressed with what he saw, and so it was quite frustrating for him to find out that he could not attend.

Q. How long did this condition that you have described so dramatically to His Honor this morning of this child continue after you got this letter of nonaccommodation? A. Well, at the moment – you know, at present – at the time that we, you know,

57 tried to let Colin understand why he couldn't attend the school, there were occasions after that that I realized that there was some aftermath of that experience that affected him, because there were times, you know, when we'd be going by somewhere and he'd ask questions, you know, like, "Well, can we go in there? Are we allowed to go in there?" I mean, this was kind of –

Q. You're speaking now of the whole broad scope of integration, aren't you?

You're not talking about schools.

I am talking about schools. I asked you: How long, after he had not been admitted, did he continue in this depressed, upset, extreme nervous condition that you told us about?

How long did that last? A. Well, it existed at the time when we tried to – you know, when we explained to him just why he was not accepted by the school, and naturally it wore off, you know, over a period of time, but, you know, there were instances when I'm sure that whenever – there were times – things that he said, you know, that I realized he was still conscious –

Q. Well, you told Mr. Brown and told the Court that you got him in Congressional in about a month. A. Yes.

58 Q. Didn't this condition improve after this little boy got in the school? A. Yes, it improved, you know, when he did realize he could attend a school where there was no question of a difference as to who he was.

Q. I ask you, Mrs. Gonzales, in the material that was sent you from the school, do you recall ever receiving that type of a pamphlet from Fairfax-Brewster? A. Yes.

Q. And for the purpose of identification, so we may give it to the Court, will you tell us what it purports to be, please? A. "Fairfax-Brewster School Parents' Handbook."

Q. All right.

And that came to you when? In which year? In '68 or '69? A. '69.

Q. '69? A. Uh-huh.

MR. McDONALD: Your Honor, I am just going to offer this, but I will have it marked for identification.

THE COURT: Isn't that Defendants' Exhibit 2?

Is that Defendants' Exhibit 1 for identification?

* * * * *

Q. Now, did you indicate on your application anywhere that you were applying not only for first grade but

64 also for summer camp? A. Yes.

Q. You did write that into your application? A. I believe there was, you know, a separate form that you filled out for the summer camp.

Q. You think there was a separate application and not this yellow one; is that right? A. I don't remember clearly, but, you know, I do know that somewhere along

the line it was indicated that I would have Colin attend both the summer camp and the school.

BY MR. KOUTOULAKOS:

66 Q. Now, as I understood your testimony, Mrs. Gonzales, you never went to the Bobbe School? A. No.

Q. You never called them? A. No, I didn't.

Q. You never filed any application – A. No.

Q. – of any type?

Neither did your husband? A. No.

Q. Of any type? A. No.

Q. You never paid any registration fee of any type? A. No.

Q. You never executed a medical certificate? A. No.

Q. Now, as I again understood your testimony, you indicated that this series of events with reference to the application – I am concerned with the Bobbe School

67 now – was sometime in '69, was it? A. Yes, it was.

Q. Now, in your suit papers, that is, where you filed your suit through your lawyer, you said it happened sometime in June of '69; in that correct? A. Yes.

Q. In your deposition you said it happened in May of '69.

Which date do you have in mind? A. Well, it – it's possible that it was sometime in late May or early June.

Q. Well, pick the date so we'll know what date. A. Well, it's kind of hard to because we had just, you know, got the rejection from Fairfax-Brewster. We tried to contact Bobbe's, and I'm trying to sort of base, you know, my memory on the time that we got Colin into Congressional, because at the time we were faced with the, you know, problems of just where, I mean, we would have him settled.

Q. So what you're telling us is, you don't remember the date? A. I don't remember the exact date.

Q. All right, fine. That's all. Thank you.

Now, at the time you say you were concerned –

If it was in May, then this youngster would have been in another kindergarter school? A. Yeah. He was still attending Crossroads.

68

Q. At the time you say you got interested in Bobbe's, this boy was in another school? A. He was still in Crossroads.

Q. So he lost no time from school? A. No, he did not.

Q. Then after that, he went to Congressional? A. Yes.

Q. He lost no time from school? A. Yes.

Q. Then thereafter, he went to parochial school? A. Yes.

Q. He lost no time from school? A. Yes.

Q. And you already told us this boy is a well-adjusted youngster? A. Yes.

Q. No question about that? A. Yes. I tried to do the best I could.

Q. You answered my question. Stick with my question.

You answered, yes, no problems? A. Yes.

* * * * *

74

Q. Now, at all times you had a public school available to your youngster, if he desired to go there; isn't that correct? A. Yes, right.

* * * * *

77

Q. Now, Mrs. Gonzales, you just invite people in your home that are friends of yours? You don't open your house to everybody, do you? A. I hope not.

MR. KOUTOULAKOS: Fine. Thank you.

That's all I have, Your Honor.

THE COURT: Counsel for intervenors have any cross-examination of this witness?

MR. LEONARD: No, Your Honor.

THE COURT: Any redirect?

MR. BROWN: Just a couple of questions, Your Honor.

REDIRECT EXAMINATON

BY MR. BROWN:

Q. Mrs. Gonzales, when you made your application for Colin at Fairfax-Brewster School, were you asked to supply a record of his previous schooling at the Crossroads School? A. No, I was not.

Q. Was anything ever said to you, prior to his application being denied, that they wanted some information concerning his private schooling? A. No, no.

78

Q. I show you Defendants' Exhibit 2, which is the parents' handbook for the year 1969-1970, which has been identified previously as the one that you received in the mail in 1969.

Now, this is the section you have read, if I'm not mistaken. It's headed "Previous Records"; – A. Right.

Q. – is that correct? A. Right.

Q. And would you read that again. A. "Previous Records: Grade school applicants must submit report cards and all other pertinent records from the school previously attended."

Q. What does the next sentence say – the next paragraph? A. "Entrance Examinations: If previous scholastic records are inadequate or questionable entrance examinations will be given. The fees are $10.00 for a single session and $7.00 for each additional session, payable in advance."

Q. I want to show you again this Defendants' Exhibit – looking still at Defendants' Exhibit 2, what does this say that this is? A. "Fairfax-Brewster School

Parents' Handbook, 1969-1970 Year."

79 THE COURT: I can't hear the witness, Mr. Brown.

THE WITNESS: "The Fairfax-Brewster School Parents' Handbook, 1969-1970 Year."

BY MR. BROWN:

Q. Now, I show you another document with a blue cover, and will you read what this says. A. "Fairfax-Brewster School Handbook, 1971 to 1972 Summer Day Camp."

Q. Is it your understanding, then, from this that the 1969 document is a – the handbook only for the school, whereas here it indicates on the blue document that this is the handbook for the school as well as the summer camp? A. Right.

Q. Now, reading the document that you – Defendants' Exhibit 2, then, when it talks about a requirement that previous scholastic records be submitted, do you read that as applying only to the school? A. Right.

Q. Do you read it as being – does it say anything in here about it being a requirement for his admission to the summer camp? A. No.

Q. Would it be your understanding as a parent that

80 the child's previous scholastic record would be an important matter for his admission to the summer camp? A. No.

Q. I show you a document, two pages.

Would you identify the two pages, please? A. Fairfax-Brewster School.

Q. Just say what they are, first. A. This – this is the rejection form that we received from the school. It reads: "The school is, at this time, unable to accommodate –" –

Q. Excuse me just a minute.

What is the second page? A. Second page appears

to be the front of an envelope addressed to "Mr. & Mrs. Raymond Gonzales, 6030 Vista Drive, Falls Church, Virginia," from the Fairfax-Brewster School.

Q. Now, what does it have on the top of the page here? A. It is an emblem of the Fairfax-Brewster School, 5860 Glen Forest Drive, Bailey's Crossroads.

Q. Would you read it, please, starting with the first line. A. "Date May 16, 1969

"Subject: Student Placement Application.

"The school is, at this time, unable to accommodate

81 the application of Colin A. Gonzales for Safari Summer Day Camp."

And there is an "X" in the box here.

"Your check –" –

"Your check submitted with form is hereby returned.

"Also enclosed is the medical form which you so kindly had completed in advance.

"Sincerely yours."

It appears like Olga M. Reiss, registrar.

I'm not sure of the name.

MR. BROWN: I'd like to have this identified as the next plaintiffs' exhibit and admitted into evidence.

* * * * *

82 Q. What is this document, then, Mrs. Gonzales?

A. It appears as a form. you know, that the application was rejected.

Q. For what? A. For the Safari Summer Day Camp.

* * * * *

87 RAYMOND GONZALES, called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BROWN:

Q. Mr. Gonzales, are you the husband of Margaret R. Gonzales, who just testified? A. I am.

Q. Will you indicate where you work and what your occupation is, please? A. I work with United Air Lines at National Airport. I am a passenger service agent.

Q. You have heard your wife testify about the circumstances under which you applied or, rather, sought admission for Colin to Fairfax-Brewster School in the spring of 1969, and she has testified that he was rejected.

Would you describe what happened after you learned
88 of Colin's – after you received word of Colin's rejection by the Fairfax-Brewster School? A. Well, I happened to – I was at home at the time and I received the mail from Fairfax-Brewster School and I read what it contained and stating that – the rejection. I immediately called Fairfax – Fairfax-Brewster School.

Q. Who did you speak to? Do you know? A. I spoke to – it's either a colonel or Captain Reiss, and I mentioned what I was calling about, that my son was rejected at the school, and he went on to state –

Well, I asked him what the reason was. He went on to state that, "Well, we are not integrated, so your son cannot be accepted."

I was really stunned because it was the last thing on my mind that, you know, that was the reason for the rejection, because previously, when we went to the school, there was nothing to indicate the question of race, you know.

I told him, in this day and age, the year 1969, I mean I really can't believe this still happens.

He says, "Well, these are the rules of the school"; and as an afterthought, he mentioned, "If you're interested, I understand Congressional Preparatory School integrated this year. You can apply there, if you wish."

89 Q. Did your conversation – or did you consider that the rejection of Colin applied both to the summer camp as well as to the school?

MR. McDONALD: Well, that's a leading question, Your Honor. I think he ought to –

THE DEPUTY MARSHAL: Stand up, sir.

MR. McDONALD: Excuse me, Your Honor.

I think it is a leading question.

THE COURT: Objection overruled.

THE WITNESS: At the time I felt the rejection was for both the camp and the school.

THE COURT: Did he say anything that would indicate that it was one way or the other?

THE WITNESS: No. There was no differentiation made known.

BY MR. BROWN:

Q. What did you do after that telephone conversation? A. Well, it took me awhile to recollect myself; however, sometime after, figuring for myself, well, what recourse do I have or what can I do, I called up the Department of Health, Education and Welfare and spoke to someone from the Education –

* * * * *

90 Q. What was your purpose in calling HEW? A. To find out from them if – if the question of segregation still exists as far as schools are concerned.

Q. You know what office you spoke to there? A. It was some section of the Education – Education Department.

* * * * *

91 Q. Who made the contact with Bobbe's School? Was it you or your wife? A. I did.

Q. And what was the nature of that contact? A.
92 It was a telephone call to Bobbe's School.

* * * * *

Q. What was the purpose in making the telephone call – your purpose? A. Well, to get information for the admission of Colin to the school.

* * * * *

93 Q. How did you know how to call Bobbe's Private School? A. Bobbe's School has an ad in the yellow pages of the telephone directory.

Q. And did you look up the telephone number? A. Yes. That's how I got the information.

Q. All right.

When you called, do you know who you spoke to? A. By name, no, but I asked for the principal of the school.

Q. Do you know what time of day it was or when it was, roughly? A. It was in the morning, around ten o'clock.

Q. When? At what – roughly the date. A. It was a weekday. I can't say what day of the week it was.

Q. I mean, what date? About when was it? A. Oh, the date.

This is around the third week of May '69.

Q. Did you speak to a man or a woman? A. It was a man.

* * * * *

94 Q. Now, can you relate the nature of the telephone conversation that you had with the man who you spoke to at Bobbe's School? A. I asked him, "I'm interested in enrolling my son at your school, however, I would like to know if you school is integrated." I was told that "We accept only members of the Caucasian race."

Well, the impact was not as severe as the initial one with Fairfax-Brewster; however, I told them, "Are you sure this is your policy?" you know. He says, "Yes." I said, "Thank you," and that ended the conversation.

* * * * *

Q. Did you discuss the problem with Colin? A.
95 On Bobbe's School, no, we – I did not.

Q. Did you discuss the rejection by Fairfax-Brewster with Colin? A. Yes, I did.

Q. What did you tell him? A. I told him, "Well, you can't go to Fairfax-Brewster School because the rules of the school states that –" – "well, their policy is that they do not accept black children there," and the fact that he was all prepared and sort of very enthusiastic about the school, this came as a surprise, you know, to him. Say, "But, daddy –" –– well, you know, "How come I didn't –" – I mean, "I see," you know, "boys and girls there and," you know, "why –" – "why wouldn't they accept me in the school?" And I told him, "Well, see, we're different than what they are and, as a result, these are the rules and," you know, "you can't attend."

Well, he was, you know, disappointed because I had mentioned also, "Well, we will have to try to get another school," and he mentioned, "Well, this one is so nice," you know, because he had been there and he had

seen what the facilities were and I know that he was upset and – well, I told him, you know, we will have to try to get him to another school.

Q. Did you grow up in Trinidad, as your wife did?

96 A. Yeah.

Q. And when you lived during your period in Trinidad – during your youth in Trinidad, had you had much experience – direct experience with racial discrimination?

A. There was no racial –

Well, no, there was no problem at all.

Q. Since you have come to this country, been living here for about six years, had you encountered racial discrimination personally here? A. No, I did not.

Q. This experience with these two schools, was this the first time you had experienced it in this country?

A. Yes, it was the first.

* * * * *

97 CROSS-EXAMINATION

BY MR. McDONALD:

* * * * *

103 Q. Did it make any mention as to whether it was for the first grade or for the summer camp? Do you know?

A. The application – the rejection form stated rejection as far as the camp?

Q. To what? A. The camp.

Q. To the camp? A. Right

Q. And was it the rejection from the camp that got you so upset? A. The rejection, yes. Well, the rejection per se, you know, as far as I'm concerned.

Q. Was it the summer camp that got you so upset? You say, per se, it did. A. It was the rejection.

At the time – I felt it included the camp and the school.

* * * * *

104 Q. And did you then get in touch with someone at the school? A. Yes, I did.

Q. And I think you said you talked to a man who identified himself as a colonel. A. Either colonel or captain.

Q. I direct your attention to your deposition that was taken, at which time your colonel was present, on Tuesday, April 10, 1973, in this cause, and you said –

I think this is your own counsel examining you.

MR. NEWTON: Page number.

BY MR. McDONALD:

Q. Page 32 of the record.

"You mentioned that the man named Reiss – you referred to him as Colonel Reiss, is that a name that you have learned since, as to his name?

"Answer: No, I remember the word, 'colonel.' As a matter of fact, I remember his using 'colonel' and not his last name. I remembered most colonel and not his last name, but I remember colonel."

Question by your counsel: "Could it have been any other rank?

105 And your answer was: "No."

Now, you were positive on the date of this deposition, were you not?

You testified under oath that your response to that was, no, it was a colonel, and today you testified that he could have been a captain. A. That is correct.

Q. Now, you don't know yet who it was you talked to; is that correct? A. As far as the person's rank, there is a bit of doubt, but the name Reiss is still in my mind.

Q. Oh, I am not talking about Reiss now, Mr. Gonzales. I am talking about the description of Reiss by the word "colonel" or "captain."

Is it not a fact that, under oath, you told us it was a colonel? A. Yeah, I did.

* * * * *

111 Q. In other words, someone that you talked to there, when you called, told you about his rejection? A. No, no, no, not – no. I spoke to colonel or Captain Reiss. That's the person I spoke to. He told me that, you know, that was his name.

* * * * *

BY MR. KOUTOULAKOS:

112 Q. Mr. Gonzales, I am only concerned with the Bobbe School. And I believe you told us that the youngster was not informed anything about the Bobbe School, that you were only concerned about Brewster; is that correct? A. I was only concerned about Brewster?

Q. Well, in the sense of telling the youngster about it. You never told him anything about Bobbe? A. Well, I felt the impact of Brewster, you know, was enough.

Q. Yes. So you never said anything about Bobbe? A. I didn't tell him the results, no.

* * * * *

118 Q. Now, with reference to the school, you had never called that school before, had you? A. No.

Q. And you couldn't recognize the voice that was on the other end of the telephone, could you? A. I mean, this I know.

Q. Then you don't know who you were talking to? A. At the time, my impression was the principal of the school.

Q. I didn't ask you for your impression.

You didn't know who you were talking to? A. No, I didn't know the person.

Q. You never talked to that party before? A. No, I did not.

Q. You never called the Bobbe School before? A. No.

119 * * * * *

Q. Well, even since, you never called that school again? A. No.

Q. So you only had the one telephone conversation? A. Right.

Q. Now, did you ask those people about what it takes to get into the Bobbe School, if, in fact, it was the Bobbe School you called? A. I never got around to that.

Q. You never did? A. No.

Q. They never told you about what you'd have to do; that is, get an application and a medical form? A. No. I knew all of that. I knew all of that, but I didn't ask
120 them.

Q. You knew you had to do all these things? A. Sure, sure, sure.

Q. Let's see what you knew.

You knew you had to fill out and file an application; is that right? A. Sure.

Q. You had to fill out and have a medical examination; is that correct? A. Right.

Q. And you had to pay a registration fee; is that correct? A. Right.

Q. Then if you knew that, you knew that on the application form of Bobbe there is no place in that that asks for the color of the child or the race of the child? A. That is correct.

Q. So race had nothing to do with the application form; is that correct? A. That is correct.

* * * * *

123 Q. Did you, for that matter? Your testimony so far doesn't even indicate to me that you even told the other party that you were, in fact, a black person. They could have thought you were Spanish, isn't that right, with your name of Gonzales? A. Well, I didn't mention my name.

Q. You never told them you were black either, did you? A. Of course I – no, I didn't tell him I was black. I asked him –

Q. No, you didn't tell him you were black. A. No, I didn't tell him I was black. I asked him –

Q. And the name Gonzales could well have imparted a Spanish flavor? A. Well, he didn't know my name.

Q. I didn't ask you that. Answer my question.

When you gave the name Gonzales, whoever it was may have thought you were Spanish? A. That's a possibility.

Q. You don't know whether they accept Spanish children or not?

MR. BROWN: Objection. He testified he didn't give his name and you put words in his mouth by saying he gave his name.

MR. KOUTOULAKOS: I thought he answered my

124 question that he did.

BY MR. KOUTOULAKOS:

Q. Are you saying you never gave your name? A. I never gave my name.

Q. So they didn't reject Colin Gonzales as such, if your testimony is correct; is that right?

I mean, you can't cut it both ways, Mr. Gonzales. Either you told them or you didn't. A. I'm not sure what you're asking.

Q. If you never told them you were Mr. Gonzales, then you never could have been rejected, that is, by applying as Mr. Gonzales? A. Right.

Q. So, then Mr. Gonzales was never rejected by that school: is that what you're saying? A. That is correct.

Q. I believe you already told us you never discussed the Bobbe School matter with your youngster; isn't that right? A. Right.

Q. Now, you don't remember the telephone number now, do you? A. Offhand, no.

* * * * *

127 Q. And that's the only contact, if, in fact, you called the Bobbe School? Just the one phone call? A. That is correct.

Q. Nothing was ever done to follow it up? A. No.

Q. Now, Mr. Gonzales, shortly after that call, you got some stuff in the mail – applications and brochures – from the Bobbe School, didn't you? A. Well, we –

Q. Just yes or no. Did you? A. Yes, yes.

128 Q. Did you fill them out? A. No.

Q. What did you do? Throw them in the ashcan? A. I think so.

Q. But after your phone call, you did get some forms to fill out, if you wanted to? A. There was a brochure. I don't know if it was received after or before, but we did get some brochures.

Q. You testified in your deposition that it was received after.

Now, do you want to change that? A. No, I don't

want to change it.

Q. So you had to receive it afterwards, if you told us the truth the first time; isn't that right? A. Well, it could have been after the phone call.

Q. But you didn't see fit to follow through on whatever that brochure and whatever forms you got required you to do? You didn't do that? A. That is correct.

Q. And this was in '69? A. That was in '69.

Q. And all of a sudden you developed, I guess, these problems and filed suit in '72, some three years later; is that correct?

* * * * *

130 Q. Now, there was a public school available to this youngster under the same conditions as all other youngsters, same opportunities? A. Right.

Q. And he could have gone there under the same conditions that all other youngsters would go to a public school, isn't that right, had you wanted him to go there? A. Under the same conditions, yes.

* * * * *

133 Q. Later in your testimony, Mr. Gonzales, if I recollect it correctly, you stated that you wanted Colin to have a Catholic education? A. Sure, we did.

Q. And that has been true since the beginning, has it
134 not? A. Sure.

Q. Why do you want your son to have a Catholic education? A. Because we are Catholic.

Q. Well, what's the difference between public school and a Catholic education? A. Well, at least religion is taught in Catholic school, and we are Catholics as such. We'd like him to continue in the Catholic faith.

Q. In other words, you'd like your son to have a special education in the Catholic faith? A. Yes.

* * * * *

135 REDIRECT EXAMINATION

BY MR. BROWN:

Q. Mr. Gonzales, you testified that about the time you made this inquiry to Bobbe School, you were unsure whether it was before or after you had received some literature or brochures in the mail from Bobbe's School. Is that correct? A. Yeah.

Q. Did you receive that material in response to a request you made, or how did it happen to come to you? A. No. This was just – these things were dropped in the mailbox. They were addressed to resident of 6030

Vista Drive. They weren't addressed to me.

THE COURT: Who were they addressed to?

I didn't hear the answer to the last question.

THE WITNESS: The brochures were dropped – Well, they were addressed to resident of 6030 Vista Drive. All the tenants received one in the mailbox.

BY MR. BROWN:

Q. Is that the kind of mail you get frequently –

A. Right.

Q. – from people who are advertising businesses?

A. Sure.

136 Q. So when you had been told over the telephone that Colin couldn't attend that school because of his race, did you submit an application, nevertheless? A. No, I did not.

Q. Why? A. Because my – my – at least my child is black. I knew – well, from what I was told on the phone, it made no sense, you know, making out – filing an application.

* * * * *

137 MAJORIE BRYANT, called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BROWN:

Q. Will you state your name and present address, please. Marjorie Bryant, 905 Creighton Court, Sterling Park, Virginia.

Q. Prior to living in Sterling Park, where did you live, Mrs. Bryant? A. 3405 Glen Carlyn Drive, Falls Church, Virginia.

Q. What part of the –

Where is that, generally? A. It's in the Culmore – Bailey's Crossroads area.

Q. Where are you employed? A. Department of the Army, Pentagon.

138 Q. And what type of work do you do? A. I am a clerk-typist.

Q. Did there come a time that you learned about a school known as Fairfax-Brewster School? A. Yes.

Q. Would you explain how that happened and what contact you had with that school? A. Yes.

Q. When was this?

Let me ask you that.

When was this? A. It was the middle of January 1972.

Q. And what did you do in the middle of January 1972 in relation to Fairfax-Brewster School? A. Well, I needed a nursery for my son, who is four years old, and I've seen that school behind the Safeway that I always shop, and I called and I asked for information concerning the enrollment of a four-year-old boy, and I asked the price and the requirements, and at the end of the discussion I told the lady that my four-year-old son was black, and she said she was sorry, that he was –

MR. McDONALD: What?

I didn't hear that, please.

BY MR. BROWN:

Keep your voice up, please.

At the end of the conversation, what happened? A.

139 At the end of the conversation, I told the lady, or whoever I talked to, that my son was black.

Q. And what did she say? A. They did not accept –

Q. Beg pardon? A. She told me they did not accept –

Q. Did not accept who? A. My son.

Q. Why? A. Because of his race.

Q. I see.

Now, you say you spoke to a woman.

Now, when you made this telephone call, where had you gotten the telephone number? A. I got if from the telephone directory, the yellow pages.

Q. And you're certain that you spoke to a woman? A. Well, I said a woman, but I'm not sure who I spoke to.

Q. Was it –

Had you – you had gotten –

You got –

You say you got a certain amount of information about school, though, before you got to that question? A. In regards to the requirements, the age requirements, and the time.

Q. Right. A. And the price.

Q. What is your son's name? A. Grady Bryant.

Q. And what is the date of his birth? A. October 28, 1967.

* * * * *

142 Q. Did you make inquiries to other schools, then, after having this conversation with Fairfax-Brewster? A. Yes. I called the Bobbe School on Carlyn Spring Road.

Q. And how did you get the telphone number? A. Well, I got the telephone number from the telephone directory, the yellow pages, and I knew where the school was located.

Q. Was it located near your residence? A. Yes.

Q. About how near? A. Approximately a mile or less.

Q. Now, when you called Bobbe's School, who did
143 you ask to speak to? A. I called one afternoon and I asked to –

Well, this is what I said. I said, "I need information concerning you school," and I spoke to a man.

He said that the information office was closed and to call back the next day.

So, I called back the next day and I asked for information, and they told me that they charge according to the school age, the child age, and I asked if they had a vacancy for a four-year-old boy, and they said, yes, they only had one.

* * * * *

Q. Continue. A. They said, yes, they had one. And so I said, "You know, I'm –"–"my son is black."

She said, "Well, we do not accept them. You can call –"–

She recommended – whoever I talked to – I'm saying "she," but the person I talked to said, "Call Congressional School on Sleepy Hollow Road, because they will accept mixed races."

* * * * *

145 CROSS-EXAMINATION

BY MR. McDONALD:

Q. When did you say you called?

When did you state that you called the Fairfax-Brewster School for information about entering your child? A. The middle of January 1972.

Q. And was that the time that they had just closed down the Crossroads School? A. Yes.

Q. How long had he been at Crossroads? A. Approximately a year.

Q. Now, when you called the Fairfax School –

First of all, let me ask you, how did you come to call Fairfax-Brewster? A. Well, I was in need for a school and I had seen that school in the back of Safeway, so I went on and called there.

* * * * *

147 A. I told them I needed information concerning the school because I was interested in enrolling my four-year-old son.

Q. All right.

And did they give you some information? A. Yes.

Q. Now, who brought up the question of race? You? A. Yes. I told them that my son was black.

Q. Why did you feel called upon to tell the school that you were trying to get a little – a boy –

It was a boy, wasn't it? A. Yes.

Q. Why did you feel called upon, without even an application or anything, to tell them that the child was black, on the telephone? A. To save embarrassmen.

Q. How would you be embarrassed?

Answer me that question. A. Well –

Q. How would you be embarrassed? A. My child would be hurt.

* * * * *

181 THE COURT: My present view of it is that I would not think it relevant, but I will hear you, if you proffer whatever it is going to be.

MR. LEONARD: All right.

Number one, our first point was, as I stated, the Norwood and Green cases – they have determined that we may maintain these schools and that we may not have

any state-aid in doing so, either by tax exemptions or by textbooks.

Our point number two: We state that section 1981 is inapplicable on its face because it is limited to the rights which are enjoyed by a white citizen, and there is no white citizen who has any right of forcible admission into these schools.

Number three, if 1981 is to be interpreted as a compulsory admission to any organization which is racially exclusive in any jurisdiction, it exceeds the constitutional
182 limits of congressional power.

That's a point of law. We have no evidence on it.

Point number two, which I gave you, is essentially a point of law based on the cases and the memorandum which we have submitted to Your Honor.

Point number one is a question of law.

So, as to those first three points, Your Honor, we have neither testimony nor witnesses.

Now, we come to point number four.

THE COURT: Four or three?

MR. LEONARD: Well, three was the question of the interpretation as the plaintiffs claim it to be which would excede congressional powers –

THE COURT: All right.

MR. LEONARD: – because it would give the plaintiffs a right to invade the freedoms, under the First Amendment of the parents who send their children to the intervenor schools.

So, we come to the fourth point, and that is essentially a problem of law; namely, whether the parents who send their children to a school which is racially exclusive, and do so deliberately for the reason that that's the kind of school they want, are in fact exercising their First Amend-
183 ment rights of association and express in the belief, which

the Supreme Court in Norwood stated was, desegregation is of value in education, as a private belief, not as a public belief.

* * * * *

189 MR. LEONARD: Well, may I ask, if there be witnesses to the contrary, then I will have to hold these.

You say he is not conceding it to be true as a matter of fact, so there is no cross-examination.

THE COURT: I gather there are no witnesses.

MR. BROWN: We have no other witnesses.

THE COURT: All right. Let me make sure, for the record, that I am fairly stating your –

MR. LEONARD: Correct.

THE COURT: – what now amounts to a proffer, I expect.

One is that the intervenor parents of children who attend the schools represented by you, the intervenor organization, act rationally in holding the belief that they do that segregation in the schools – private schools or "private schools"
190 in holding the belief that they do that segregation in schools does produce a better level of education or higher level.

I don't know whether I stated it correctly.

MR. LEONARD: That's correct; and lower disciplinary problems.

THE COURT: And that, secondly, the schools which are involved in your membership are competent educational facilities, having a high level of education, with low disciplinary problems, both of which your witnesses would testify to are causally related to the segregated policies followed by those schools.

MR. LEONARD: That is correct, Your Honor.

THE COURT: All right. I just wanted to make sure –

MR. LEONARD: Purely as a matter of procedure in past trials, the difficulty I seem to have is that one makes a proffer only when the admission of certain evidence has

been denied as to relevance or otherwise; and here, as I understand it, it is before the Court as if so testified.

THE COURT: Yes, with the understanding that I may still rule it is irrelevant; that I haven't ruled that way yet,
191 but that I have it under consideraton, and the motion is to remove it is irrelevant, and I suspect that motion will be – or to strike it as irrelevant.

MR. LEONARD: Well, under these circumstances, then, couldn't we make a stipulation, Mr. Brown?

All right.

It is stipulated that it would be so testified, and that's it?

MR. BROWN: I have nothing further to say. Judge Bryan has stated –

THE COURT: It is stipulated by Mr. Brown that if these witnesses would testify, that they would testify to the two enumerated propositions.

MR. LEONARD: All right, Your Honor.

* * * * *

194 SANDRA McCRARY, called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BROWN:

Q. Will you state your full name and address for the record, please. A. Sandra McCrary, 9849 Lake Point Drive, Burke, Virginia.

Q. Are you employed, Mrs. McCrary? A. Yes, I am.

Q. Where do you work? A. I work at the Naval Air Systems Command in Jefferson Plaza, Arlington, Virginia.

Q. And what is your occupation? A. I am an equal employment opportunities specialist.

Q. How long have you lived at your present address in Burke, Virginia, Mrs. McCrary? A. Since March 1,
195 1973.

Q. Prior to that time, where did you live? A. At 6062 Belview Drive, Falls Church, Virginia.

Q. Where is that located? A. It is located approximately in back of the Culmore Apartments, just a little ways down on Route 7 from Bailey's Crossroads.

Q. How long have you lived at that location? A. About four years.

Q. Do you have a son named Michael, who is a plaintiff in this suit? A. Yes, I do.

Q. What is his age? A. He was three on July 7, '73.

Q. So his date of birth was July 7, 1970? A. Yes, it was.

Q. What is his race? A. He is black.

Q. What is your husband's race? A. He is black.

Q. Did there come a time when you learned of a school known as Bobbe's Private School? A. Yes, sir.

* * * * *

196 Q. Had you ever seen any advertisements in the mail
197 or phone book, or anthing of that sort? A. Not in

the mail, but I did see it advertised in the classified section of the phone book.

Q. Did there come a time when you wanted to enroll Michael in Bobbe's Private School? A. Yes, sir.

Q. When was that? A. Approximately the first week in August '72.

Q. Did you make some contact with Bobbe's School? A. Yes, I did.

Q. In what way? A. A phone call.

Q. Can you tell me who you spoke to? A. I cannot tell you his name. It was a male that answered.

Q. Did he identify himself? A. In all honesty, I cannot recall if he did or did not.

Q. How did you get the telephone number for the school? A. Through the classified.

Q. Will you relate the nature of the telephone conversation?

* * * * *

198 A. Upon calling the school, I inquired about their policies, if transportation was provided, the price, whether there were hot meals provided, various questions centering around the policy of the school, also the matter of toilet training.

I had heard that Bobbe's School did provide toilet training for an additional fee.

I posed this question, and the gentleman told me, yes, and it was for an additional fee. I believe the fee stated was approximately $35 per week.

At the end of the conversation, I stated something to
199 the effect, "Incidentally, you're integrated," and he stated, "No, we are not."

So to clarify this, I stated, "You mean you do not accept black children?" and the gentleman said, "I'm

sorry, we do not."

I said, "Thank you," and hung up, and that was the end of the conversation.

Q. Was anything else said to you in the phone conversation which would be a basis for your believing that Michael would not be acceptable there other than his race? No, sir.

* * * * *

200 Q. Did you know anyone else whose child went to Bobbe's Private School? A. Yes, sir, a neighbor of mine.

Q. A neighbor? A. Yes, sir.

Q. What was her name? A. Mrs. Gene Price.

Q. Did – she had – what was her –

Who was her child that went there? A. His name was Samuel Price, and he was approximately three months younger than my son.

Q. And when did he attend the school? A. He was accepted about a week or two before I placed the phone call. It's not exactly clear just how long.

Q. What was his race? A. White.

Q. Was Samuel toilet-trained? A. No, sir, he was not.

* * * * *

202 Q. What other specific arrangements did you make to enroll Michael in school that year, or did you? A. Upon calling one or two other schools and having the same difficulty, one, that he was not yet three years old and, two, that he was not toilet-trained, we were really caught up in that we needed a place to send Michael. So
203 his grandmother offered to take care of him in the meantime while we could find another place.

203 Q. Well now, this was in August of 1972.

Through 1972 through 1973, did he attend another school? A. Yes. We located the name of a woman who operated a home nursery school and we enrolled Michael there.

Q. Where is that located? A. That is located on Oakland Drive in South Arlington.

Q. What is the name of that school? A. Green's Home Nursery.

Q. About how many miles or how far from your residence was that located? A. My residence now or my prior residence?

Q. Well, your prior residence. A. I'd say approximately – very bad at this – ten miles.

Q. So when did he first start going, then, to Green's Home Nursery? A. It was in September.

Q. So from September until –

Does he still go to that school? A. Yes, sir, he does.

204 Q. And you moved away from Bailey's Crossroads in March; is that correct? A. Yes.

Q. So from September to March you transported him, or did you, or did they provide bus transportation? A. No. I transported him.

Q. You transported him to Green's Home Nursery.

How far from your home was Bobbe's Private School located – your residence at the time that you made this inquiry? A. Approximately a mile.

Q. Was this boy, Sammy Price –

Where did the Prices live in relation to you? A. Right next door, in the next apartment building.

Q. In another building? A. Yes.

Q. Did Michael know the boy, Sammy? A. Yes. We had a kind of reciprocal agreement on baby-sitting,

and I would baby-sit Sammy and Mrs. Price would baby-sit Michael. So, they were quite good friends.

* * * * *

205 Q. Well, continue.

Michael knew Sammy and Sammy was going to the school.

Now, do you think Michael had any reaction to that? And if so, would you explain why you had reason to be-
206 lieve so? A. At the time they would play together in the afternoons, my working hours were different than Mrs. Price's, so I came home earlier than she did. Michael would sit by the window and wait for Sammy to come home. They didn't say very many words. They could say "Buddy," and that's what they called each other and that's what I heard until Sam would come home from school.

Q. Now, would you describe – describe how you felt as a result of learning that Michael could not attend Bobbe's School?

What was your reaction?

* * * * *

207 THE WITNESS: Well, initially I was shocked and hurt, and then when I thought about it, in a strange way I was pleased because Michael was not at the level of awareness that I would have to sit him down and tell him, "You cannot attend this school because."

Eventually, I became angry, and that's when I decided to take some sort of action.

BY MR. BROWN:

Q. Did you discuss Michael's inability to attend Bobbe's School with your husband? A. Yes, right after the phone conversation.

Q. Did you discuss it with friends and co-workers?
A. Yes, I did.

Q. What was they reaction? A. Sympathetic.

Q. How did your husband react to Michael's inability to attend Bobbe's School on the basis of his race? A. My husband became very angry. What he stated at the time was that he felt that he had left demoralization and embarrassment behind him, that he had managed to go to school and be employed and progress in his job, and he had hoped his son would never have to be submitted to something like this.

I believe he said something to the effect, "What was the use?"

* * * * *

BY MR. KOUTOULAKOS:

218 With reference to your deciding to enter your youngster in school, as I recall, you said he was two years old at the time; is that correct? A. Two years, one month.

* * * * *

222 And then when you called the school, you don't know who answered on the other side? You assume it was somebody from the school; is that correct? A. Yes, sir.

Q. You had never called that school before? A. No, sir.

Q. And you had never talked to anybody at that school before? A. No, sir.

Q. So you really don't know who you were talking to?
A. Someone with a lot of information.

Q. But you didn't know who you were talking to, was my question. A. No, sir.

Q. Then, if they had a lot of information, they had to tell you, if in fact you called the school, that there were certain requirements to get into that school; isn't that
223 correct? A. We discussed primarily the policy.

Q. Well, let's talk about what it takes to get in, not what you primarily discussed.

Didn't they tell you what you have to do to get in, like filling out forms, getting a medical examination?
A. That was not discussed at the time. The gentleman told me that I would have to come in.

Q. And do what? – because you left that out in your direct examination.

What was it he wanted you to do now? A. He stated I would have to come in and fill out –

Q. And do what? A. – fill out an application.

* * * * *

224 Q. But even with that statement, you now tell us this person told you to come in and make out an application; is that correct? A. He told me I would have to come in and make out an application before I asked him if they were integrated.

Q. What else did he tell you regarding gaining entry into this school? A. Other than coming in and filling out an application, the rest of what we discussed was purely as I stated before: the policies of the school as far as meals, toilet training, and whatever.

* * * * *

232 Q. And this was the only contact you ever had with the school, just the one time; is that correct? A. Yes, sir.

Q. And your youngster, I believe you said, is a well-adjusted youngster? A. Yes, he is well-adjusted.

* * * * *

236 CURTIS L. McCRARY, called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BROWN:

Q. Will you state your name and address, please.
A. Curtis L. McCrary, 9849 Lake Point Drive, Burke, Virginia.

237 Q. Are you the husband of Sandra McCrary, who's just testified? A. Yes, I am.

Q. Are you the father of Michael McCrary? A. Yes.

Q. Did there come a time when you learned of a school named Bobbe's Private School? A. Yes.

Q. Did you or your wife have a conversation with someone concerning Bobbe's Private School? A. Yes. My wife did.

Q. Your wife did.

What kind of conversation or what – how did she talk to them? A. Well, she called them up and she – she asked whether they had toilet training and she asked about meals, the hours.

Q. You were in the room and she testified that you were in the room, when she made the telephone call; –
A. Yes, I was.

Q. – is that correct? A. Right.

Q. And you heard her talking? A. Yes.

Q. When she was through talking on the telephone,
238 did you learn that Michael could not attend Bobbe's School? A. Yes, I did.

Q. Did she tell you the reason? A. Yes, she did.

Q. What was the reason she said. A. Because of his race.

Q. How did you feel as a result of that? A. Well, I was angry; I was very angry, as a matter of fact. My wife was very upset.

It is a fact that during that time we really needed a baby-sitter. Bobbe's School was very close and, you know, it – just couldn't understand why, you, they wouldn't accept him.

I was very mad.

Q. Where did you grow up, Mr. McCrary? A. Atlanta, Georgia?

Q. Atlanta, Georgia? A. Yes.

Q. Where did you go to school? A. I went to school in Atlanta, Georgia.

Q. What education have you had? A. High school.

Q. Just high school? A. Well, I have had some formal training after I went to technical school.

239 Q. Technical school? A. Yes, and I had service training, schools in service.

Q. Where do you work now? A. Nimrex Corporation. It's a computer manufacturer.

Q. Whereis it located? A. The home office is in Sunnyvale, California, and we have an office here in McLean, Virginia.

Q. Is that where you work? A. I work out of there, yes.

Q. In McLean? A. Well, I work out of there. That's my office in this area.

Q. I see. What kind of work do you do? A. I am a computer engineer.

* * * * *

240 Q. When you, in the course of your job –

Well, let me ask you this.

How long have you lived in this Northern Virginia area? A. I have been here since '66 - 1966.

Q. And you moved here after coming from Atlanta? A. Well, no. I was stationed here in the Navy. I spent two years here in the Navy, and I got out in '68 and I have been here in a civilian capacity ever since.

Q. Well, since 1966, when you lived – the period that you lived here, have you had frequent experiences where you have been discriminated against because of race? A. No.

Q. Have you ever had any experiences? A. I have as a kid, growing up in Atlanta, but not since I went into service and after that, no immediate discrimination.

Q. None since you have lived here in the Washington area? A. Right, none that I know of.

Q. Was the experience that you had with Bobbe's the first exposure you had had to racial discrimination for
241 some time? A. It was the first time, you know, that it hit home. It immediately affected me.

Yes, that was the first time.

Q. What did you tell your wife or what did you say to your wife when you were discussing it? A. Well, at the time we were – like I say, we were very upset.

The fact – the fact was that we were really hurting for a baby-sitter. The baby-sitter we had was – was going back to school. So, we had to find some type of a sitter. We –

I take that back.

We had to find some type of a day-care for him. We didn't want the – this – we didn't want to go to an individual sitter again because we felt that Michael was of age where he should be exposed to more kids.

It's a proven fact that kids learn a lot more when they are around kids, and he was just beginning to talk a little bit.

Q. He was just waht? A. Beginning to talk, so–-

Q. Did you discuss your experience concerning Bobbe's School with co-workers? A. Yes, I did.

Q. What kind of conversations had you had with them
242 about it? A. Well, you get the – you know, you get the story, "Well, that's too bad; that's too bad. Why don't you move out here? We have integrated nurseries," and all that kind of stuff.

See, at the time we were trying to enroll Michael in a day-care nursery, we were also in the process of buying a home. So, several of my friends recommended that I move out to Montgomery County where they live, you know, and we wouldn't run into it, have any problem like this, and I could carry my nursery – I mean, carry my kid to the nursery with their kids.

MR. BROWN: That's all I have.

MR. KOUTOULAKOS: I just have a couple of questions.

CROSS-EXAMINATION

BY MR. KOUTOULAKOS:

244 Q. And I take it the little boy is now in the Green School, is he? A. He is in Green's Nursery, yes.

Q. And doing all right, I take it? A. He's doing fine.

Q. He seems to be well-adjusted, doesn't he? A. Yes, sir.

Q. Was there ever any attempt by you with reference to going to the Bobbe School and filling out whatever applications would be necessary? A. There was no need to.

Q. Well, was there an attempt?

Whether there was a need to or not His Honor will decide. A. Why should I further embarrass myself?

Q. In any event you didn't do that? A. No, I didn't.

* * * * *

249 OLGA M. REISS, called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McDONALD:

Q. Now, Mrs. Reiss, in testifying this afternoon, please, at all times, keep your voice up so His Honor and the reporter and all counsel may hear your testimony.

I ask you, initially, if you will state for the record your full name and tell us where you live. A. My name is Olga M. Reiss. I live at 3322 Prince Charles Court, Falls Church.

Q. Is that in Fairfax County? A. Fairfax County.

Q. And how long have you lived in that area? A. I have lived in Fairfax County for, oh, but about three years of my life.

Q. What is your marital status at this time? A. I am married.

Q. And what is the name of your husband? A. Robert S. Reiss.

250 Q. You have any children born of the union? A. I have one child.

Q. All right.

Now, are you related in any manner to Mr. Steuart A. Reiss, one of the parties to this litigation? A. Yes. He is my father-in-law.

Q. And what is his official capacity with the school at this time? A. My official capacity?

Q. No, your father-in-law. A. My father-in-law. He is the chairman of the Board of Directors of the corporation.

Q. All right. And your husband? A. And treasurer also.

Q. What is your husband:s name? A. My husband's name is Robert S. Reiss.

Q. Does he have any official association with this school? A. Yes, He is director of the school and also president of the corporation.

Q. How long have you been associated with this school? A. Since its beginning in 1955.

Q. All right.

Tell us, Mrs. Reiss, what type of school is the Fairfax-
251 Brewster School? A. Fairfax-Brewster School is a private educational institution, with a preprimary department composed of nursery through senior kindergarten and also elementary school department, grades 1 through 6.

Q. And where do you secure your students? What's the formula used for procuring students? A. Usually, for the very most part, our students come to us from word-of-mouth; in other words, parents telling other parents about the school.

Q. Do you select your students from any geographical area in the county or adjoining areas? A. Not necessarily, although most of them come from a farily close proximity to the school, but this is not necessary.

Q. Are most of them from the State of Virginia? A. Oh, yes.

Q. Does the school advertise in any way in any newspapers, magazines, radio or television, either for its summer camp or for its regular – A. No.

Q. – schooling?

Now, there has been some testimony here today – you may have heard it – about getting a number of the school from the telephone book. Do you list your school in the
252 telephone book? A. In the Virginia telephone book, we have a listing, and I believe it just tells a little bit about the school, –

Q. All right. A. – the fact that it is a private school and offers nursery through the sixth grade.

Q. Now, you say that you serve there as the registrar. And will you tell us just what duties are embraced by the registrar? What do you do there? A. My duties as registrar consist of each year preparing and revising and compiling all enrollment registration materials preparatory to enrolling children.

Q. Do your duties in any way require you to review applications with respect to educational backgrounds or ages or the things that go on an application? A. Correct.

* * * * *

253 Q. Now, there has been shown here today two pieces of material that have been marked Defendants' Exhibits 1 and 2, and I ask you: are these the pieces of material that would be sent to an applicant regularly in the course
254 of the procedure of the school? A. Yes.

Q. And will you tell us what Exhibit 2 is? A. This is the parents' handbook for the year 1969-70.

Q. And will you tell us what this is, please, 1? A. This is an informational brochure which could be used

for any year; could be used for many years, actually.

* * * * *

Q. I assume you are quite familiar with the contents
255 of this handbook, are you not? A. Very.

Q. Now, directing my question particularly to the educational requirements of students seeking admission to the school, first grade and up, I ask you if you will take this and look at page 2 and tell us if there is anything on that page with respect to any requirements that are necessary for a child submitting an application to the school for first grade. A. We have a section called "Previous Records" which states, "Grade school applicants must submit report cards and all other pertinent records from the school previously attended."

Q. Is that procedure followed in all cases in the first grade – where people are applying for first grade? A. That's correct.

Q. Now, do you recall personally or do you know whether or not these were ever sent to these people? I mean Mr. and Mrs. Gonzales. A. They would have had to be because this was the common procedure that we would follow when people would call us: we'd send them out.

* * * * *

260 Q. Now, what was the policy of the school with respect to first grades?

How many first grades did you have, as a general rule, up until 1969? A. From 1961 on, we had always had two first grades, but in 1969 we had only one first grade.

Q. All right.

Was there any particular reason for that that you –

Maybe you have told us, but was there any reason why, in '69 and '70, you were only going to prepare for one first grade group? A. Yes. It was not too good a year economically and we could see the handwriting on
261 the wall and we felt that it would be better to have one full first grade, one good first grade, than two first grades with just a scattered number of students.

Q. How many students were you contemplating taking into the first grade for the year '69-70? A. About 20 students.

Q. Have you made a computation of the students that were to come into the first grade class for '69 and '70? A. Correct.

Q. I hand you a paper, ask that you tell us what that is by way of identification. A. This was the first grade class for the 1969-70 school year.

MR. McDONALD: And I'd like to have this marked as an exhibit, and I will show it to counsel.

(The compilation was marked and received in evidence as Defendants' Exhibit No. 3.)

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262 BY MR. McDONALD:

Q. Now, I ask you: this Exhibit 3 which you just testified to, how many students that were going into the first grade in '69 – the fall of '69 – came from your kindergarten? A. All but five came from our kindergarten.

Q. All right. Now – A. Our own kindergarten.

Q. What were the basic requirements – tell us that before we lose it – for a child – any child coming there

and applying for first grade? What did he need to get to be approved – for the school to approve his application? A. We would require, of course, that he come from our own kindergarten or that he would have had prior schooling in a kindergarten program which included a reading and numbers writing program.

Q. Now, what was your experience with children coming from day nursery schools with respect to qualifying for first grade in your school? A. A day nursery school is not a kindergarten. It is an entirely different thing, –

Q. All right. A. – and I would not consider that
263 sufficient background to go into our first grade.

Q. Now, the five that you have stated that were taken in, over and above your kindergarten graduates, were they qualified kindergarten people?

I mean, did they meet your test of qualifications?
A. Yes. All five had been through kindergarten programs.

* * * * *

270 Q. Let me ask you: did you know anything about the educational training with respect to kindergarten or anything about teaching – education given in that school by the people that ran that Crossroads School? A. To my knowledge, it was a day nursery, day-care center only. There was no kindergarten program.

Q. Now, is there any requirement that your own kindergarten students might measure up to certain readiness standards before being admitted to your first grade?
A. Yes.

Q. What would you do to determine, from time to time, whether even your own kindergarten graduates were

fit to pass or qualified to pass to the first grade? A. Well, of course, our kindergarten program is a very, very good one, and the children use workbooks all year, and in that way the teacher is able to see what they are doing to help them along, and she can tell if a child – if
271 she doesn't think a child is just going to be able to make it before the end of the year; and then in May we also give standardized ratings tests.

Q. All right. Now, let me go back.

You said that there were discussions. You put this application on Colonel Reiss' desk, that you and your husband Robert, who is the president of the school – you all discussed it; is that correct? A. Uh-huh.

Q. What was the nature of those discussions when you were discussing this boy's application for admission to your school? A. The – of course, we were discussing the idea that we – of only having one first grade class, and we could tell by the way the enrollments were coming in and also by other statistics that practically all of this class would be from old students. We could tell this, and that, therefore, there would be very, very few vacancies for any new students and we knew, by reputation, that the Crossroads Day Nursery simply did not have a kindergarten and we wanted to – we knew that we had a good bunch of children coming into that first grade. We wanted to have any other children coming from an outside source to have a sufficient previous education to allow them to compete successfully in that class.

Q. Now, let me ask you: was Colin Gonzales' applica-
272 tion in this meeting equated entirely on an educational background or did any other thing enter it that would have prevented or did prevent him from becoming a student in the first grade or even the summer camp in that

school? A. I would say that it had to be the educational background.

* * * * *

Q. Mrs. Reiss, let me ask you this question. Have any children, to your knowledge, applying for admission to Fairfax-Brewster, with only day nursery school training, every been admitted there? A. To first grade?

Q. To the first grade, yes. A. No.

* * * * *

273 Have you had occasion, in connection with the preparation for testimony here, to review your records and make a compilation of the non-Caucasian students that have been admitted to that school in the various years, with special reference to '69-70 and on down to date? A. Yes.

Q. Is that your own compilation from the official records? A. Yes.

* * * * *

276 Q. Had there been any male or female applications of the Negro race before Gonzales' application or since the
277 denial? A. No.

Q. Have any whites filing applications for admission there ever been denied admission? A. You mean whites?

Q. Whites. A. Yes, yes.

Q. And what would be the reasons, if you know? A. It would be our matter of policy. If we did not feel the white child could measure up to our standards, we would not accept him. Also, we might not accept him if we learned that he had an emotional problem or was abnormal in some way –

Q. All right. A. – or for physical reasons.

CROSS-EXAMINATION

BY MR. BROWN:

* * * * *

278 (The advertisement was marked and received in evidence as Plaintiffs' Exhibit No. 3.)

BY MR. BROWN:

Q. Would you say, Mrs. Reiss, that that advertisement accurately reflects the program that Fairfax-Brewster offers? A. Yes.

279 Q. And it states, does it not, that it has its private school, with nursery and kindergarten, grades 1 through 6; is that correct? A. That's correct.

Q. And it also states at the bottom of the ad that there is a Safari Summer Day Camp and a Totem Lodge Summer Program; is that correct? A. Right.

* * * * *

Q. You have testified concerning the 1969 parents' handbook for Fairfax-Brewster School. Right? A. Uh-huh.

Q. Now, you have testified concerning the paragraph on page 2 that refers to "Previous Records" – A. Right.

Q. – which –

Right? A. Uh-huh.

Q. Now, will you read what the following paragraph states. A. "Entrance Examinations: If previous scholastic records are inadequate or questionable entrance examinations will be given. The fees are $10.00 for a single session and $7.00 for each additional session,

payable in advance."

Q. Was Colin Gonzales given an entrance examination? A. No, he was not.

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ROBERT S. REISS, called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * * * *

DIRECT EXAMINATION

BY MR. McDONALD:

Q. Mr. Reiss, I want to ask you initially: tell us your full name and tell us where you live. A. My name is Robert Steuart Reiss. I reside at 3322 Prince Charles Court, Falls Church, Virginia.

Q. And you are the husband of Mrs. Reiss, who just testified here? A. Correct.

Q. And you are associated in some capacity with the Fairfax-Brewster School? A. That is correct.

Q. And what is that capacity, please, sir? A. I am the administrative director of the school.

Q. How long have you been with the school? A. Well, I have been associated with it ever since it was founded in '55. About eighteen years.

Q. How is your school maintained financially? A. Our school is maintained financially solely through tuitions paid by parents.

Q. Do you know of your personal knowledge that an application was submitted to your school by the parents of Colin Gonzales sometime in May or June of the year 1969? A. Yes.

Q. And was there a conference held with anyone other than yourself to discuss the merits of the application and as to whether or not it would be accepted? A. Yes.

Q. And who sat in on that conference? A. Well, that year, it happened to be myself, MRS. Reiss and my father, Steuart Reiss.

Q. During this discussion, did you have an opportunity, as the president of this school, to examine the application? A. We discussed the – the application, yes, the applicant.

Q. Do you recall today, looking back, if the application set out on it the school that the boy was in, if he was in a school, this young Colin? A. I believe it was the Crossroads Day Nursery.

Q. Right, sir.

Now, what action was taken after you and your father and your wife discussed this application? A. Well, after we had finally gotten to the application, it was felt we had to deny the applicant.

Q. Well, what was the basic reason for the denial of the application, Mr. Reiss? A. Well, the basic reason for the denial of the application was a lack of educational preparatory background for our first grade situation.

Q. Did you gather from the application the knowledge that he was at Crossroads that he did or did not have sufficient preschool training to admit him (sic)? A. Well, on the basis of the fact that there was no evidence to indicate what he had done in his prior situation with the Crossroads –

Q. I didn't hear that. What was that? A. I say, on the basis of the fact that there was nothing for us to evaluate as far as what he had received in his training situation at Bailey's Crossroads Nursery, we could certainly not make an evaluation of that, and we have – it

would be very unlikely that we would ever allow a child from day-care nursery of this type to come into the first grade and be able to compete and meet success in a fast-paced first grade.

* * * * *

308 CROSS-EXAMINATION

BY MR. BROWN:

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309 Q. Would it not be normal, when an application comes in and the child – when it indicates some deficiency, to make some inquiry about it, to talk to the child's parents about it, and that sort of thing? A. You mean if I actually had records to peruse and to investigate?

Q. Yes. A. If I had – if a child came into the school and had records that seemed to be untoward to us or incomplete or questionable, then, under such circumstances, we might pursue it. It would just depend on its own circumstances. I mean, it wouldn't be a blanket statement to that effect.

Q. Well, if a child – the record – your own application form showed a child had attended a particular school but it didn't contain any – there was no other information – no other records that were given – A. Just the fact –

Q. – concerning his background or ability or anything – A. Just the fact that the child had attended X school?

Q. Yes. – what would you do then? What do you

310 do then? A. If we got information that the child had attended X school, we would require, nonetheless, that we

have the information from that school. I want to see the report card; I want to see everything I can get my hands on for every child that comes into Fairfax-Brewster School, because it serves no useful purpsoe to have a child there who is not going to be able to profit from the program.

So if that answers your question –

Q. Well, when an enrollment application is submitted and it doesn't have that information, how do you get it? How do you normally get it? A. You mean if it doesn't come in?

Q. Yes.

You contact the parents and ask them for it? A. I might, yes.

Q. You might? A. Might.

Q. Did you contact the Gonzaleses and ask them for more information about the school their child had gone to? A. No, I don't believe we did.

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314 Q. You have means, do you not, of testing children entering first grade to determine whether they're ready for school? A. Yes.

Q. But you have no such test to Colin? A. No.

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324 STEUART A. REISS, called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McDONALD:

* * * * *

325 Q. Tell us, initially, your name and tell us where you live. A. My name is Steuart A. Reiss. I live at 3227 Valley Lane, Falls Church, Virginia.

Q. And for how long have you been a resident of the Virginia area? A. I am a native Washingtonian; have lived in Virginia some thirty-one years.

Q. Thank you, sir.

Now, when was the Fairfax-Brewster School established? In the spring of 1955.

Q. And have you been associated with the school since its inception? A. Ever since.

Q. And what have been your official relations with the school? A. As president in the first two years, then as treasurer and board chairman.

Q. Now, you have been referred to here and outside as "Captain."

* * * * *

326 I ask you, do you recall the circumstances in the matter of the application of a young boy named Colin Gonzales for admission to your school? A. Yes, I do.

Q. Yes.

And when the application came up for decision, who passed on it or who considered it? A. The consideration was made by myself, my daughter-in-law, the registrar, and Mr. Robert Reiss, president of the school and the director of it.

Q. Do you recall about the time that this application was considered, just monthwise, approximately? A. Well, I think it was sometime in May or June and – now, that's four years ago.

327 Q. What year are we talking about? A. '69.

Q. All right, sir.

Now, will you, for the record, tell us the nature of the discussions that were held at that time regarding the application of this young boy for admission? A. The discussion centered on his scholastic qualifications for entry into the first grade.

Q. Do you recall particularly the application with respect to the qualifications that you knew that he had? A. Well, I distinctly remember that his previous attendance to a school, which was really a facility known as Crossroads Day Nursery, a nonqualified school–there was nothing in his application–and this was the discussion that came to this point, and it was very strong around the – that he had nothing in the application which would show any previous training whatsoever, no report card, no evaluation, no record of reading readiness or numbers testing; none of the numerous things that a child should have in qualifying papers for entry into the first grade, particularly for a school who kept the standards we did.

* * * * *

331 Q. Has the policy of your school, since its inception, every been to bar an application for admission for a black child? A. Mr. McDonald, that would be the farthest thing from my mind or the mind of the staff.

The basics of this school are educational qualifications and excellence. That is our own and simple and first requirement of any nature.

Q. You require rather high standards for kindergarten and eligibility for first grade, do you not? A. We do. I believe it's much higher than the public schools and higher than many other private schools.

Q. Now, I hand you a paper that you have given me this morning, and I ask you, by way of identification, tell us what it is and what it reflects. A. It reflects the curriculum in the senior kindergarten of Fairfax-Brewster School, as well as the curriculum in the first grade of Fairfax-Brewster School.

Q. Now, as you look at that, are you aware and are you telling us now of your own knowledge and not what someone else told you that that reflects the curriculum and the requirements of the senior kindergarten for en-
332 trance to your first grade? A. That does.

Q. And does it reflect anything with respect to requirements to first grade? A. It certainly does: science, French –

Q. Just a minute.

MR. McDONALD: You don't have any objection to that?

I'd like to have this appropriately marked, Mr. Clerk, for the defendant.

Your Honor, I know we don't have a jury. May I read this in the record?

THE COURT: Is it admitted in evidence?

MR. McDONALD: Yes.

THE COURT: Any objection?

It will be received in evidence.

(Document entitled "Courses of Study" was marked and received in evidence as Defendants' Exhibit No. 6.)

* * * * *

336 How do the rates of your school compare to other private schools? A Oh, I think they're just competitive. They may be a little higher.

337 Q. I'd like to ask this. I neglected on yesterday to ask your daughter, Mrs. Olga Reiss, a question about her educational background. Are you familiar with her edu-
338 cational background? A. Yes. She has a degree in education.

* * * * *

CROSS-EXAMINATION

BY MR. BROWN:

Q. Mr. Reiss, you have testified to your military background.

What other training and background to you have? What other occupational endeavors have you engaged in? A. What other occupational endeavors?

Q. Yes. A. Other than military?

Q. Yes. A. None.

Q. None.

What kind of education do you have? A. I am a graduate of the United States School of Military Aeronautics. That would be the Air Force Academy as it is today.

339 Q. Do you have any training or schooling in education? A. No, I do not have any training in education.

Q. Does your son? A. Yes, he has.

Q. What is his educational background? A. I believe he has a degree in education; I believe in speech therapy.

Q. From where? A. George Washington University.

Q. And what is your daughter-in-law's degree in? A. Education.

Q. From where? A. George Washington University.

Q. In the general make-up of your school –

now, you have testified that it's been in operation since 1955, correct? A. Correct.

Q. What are the general nature of the families that send their children there; that is, are a good many of them government employees, military families?

What kinds of people send their children there? A. It is a mixture of people in Northern Virginia, because we have only people from Northern Virginia in the school. Those families, as I said, are a normal mixture of the
340 people that you could expect to find here. Many are embassy people from various embassies whose attaches are living in Northern Virginia.

Q. Excuse me for a moment.

Is that what accounts for a good many of the non-Caucasians who are listed in one of your exhibits? A. That would.

Q. All right. Continue, please. A. As well as the military.

Q. Military. A. Military and government. They're not the preponderance, I might say, but they are a substantial number.

Q. What are the preponderance? A. Oh, I actually couldn't give you the answer to that right off. I would have to read the figures over and compute it, but I would say a good section of our students are comprised of military, government – mostly military and government and civilians and some of the children of the embassy – attaches.

Q. Are the people who send their children there people who – many of them have traveled around a good deal, they're transients and they move into Northern Virginia in connection with government or military, and that sort of thing? Not too many of them are native
341 Northern Virginians, are they, would you say? A. Oh,

yes, I would say that probably most of them are natives of Northern Virginia, people who live here and in business. We do have a section comprised of military and, as I said, the government people and children of the attaches of the various embassies.

Q. When a person brings their child to enroll him in the first grade in your school or family, what are the kinds of reqsons they give, generally? What are the general reasons that, say, would cause a family to choose your school as against the public school? A. The general reason is that they – as I believe it has been testified previously, most of our people come from hand – hand-to-mouth – not hand-to-mouth – but from word-of-mouth. People bring their children there because I think they realize it is a quality school and this is what they are looking for – quality education – and that is the reason they come to the school.

* * * * *

345 Q. Well, you have in your literature – are you familiar
346 with this document? A. I am.

Q. Would you state what it is? A. It is the grades of Fairfax-Brewster. That's the title.

Q. And what is the nature of it? Is it a promotional brochure? A. It is a brochure. It is a brochure – descriptive brochure.

* * * * *

347 Q. Would you read the boldprint on the back page here? What does it say? A. "Testing and Evaluation."

Q. Would you read the first sentence? A. "Entrance examinations are required for all new students. Each grade school child –"–

* * * * *

352 MR. McDONALD: I think this is already –
I don't know whether this is in evidence or not.
Is this in evidence – these sheets?
I'd like to then offer as part of our case, Your Honor,
353 a letter from Mr. Brown, bearing date of June 27th, addressed to me, with respect to a proposed stipulation of facts, which I had, previous to that time, proffered to him, in which he agreed to the stipulation of facts that – I am referring here to stipulation 1, 2, 3, 7, 10, 11 and 12. The others we could not agree on and we don't have any agreement on it, but I'd like to show that these – they are rather important. They are mostly pro forma, but I wanted the record to show that that's been stipulated.
THE COURT: Any objection to that?
MR. BROWN: No.
THE COURT: All right, suppose you file that.

* * * * *

354 Now, Your Honor, before I proceed, I want to know exactly what section Mr. Brown is proceeding under so I can cut out a lot of unnecessary testimony.
I understand we are now, purely and simply, down to 1981 and nothing else.
THE COURT: That's my understanding.
MR. BROWN: Yes, Your Honor. I think we might have this understood in the record because originally in our complaint we had stated – asserted 42 U.S.C. 2000(a) as a basis for jurisdiction in the case, but we are abandoning that and rely solely now on 42 U.S.C. section 1981.
THE COURT: That is my understanding of the stipulation with the intervenor, anyway, –
MR. BROWN: That's correct.
THE COURT: – and I assume that stipulation carried

over to Fairfax-Brewster and to Bobbe's School.
MR. McDONALD: Yes, Your Honor.
THE COURT: If it doesn't –
That's your understanding, too, Mr. McDonald?
MR. McDONALD: Yes.
355 MR. KOUTOULAKOS: That's what I understood, but I wanted the record to show that.
THE COURT: All right.
MR. KOUTOULAKOS: Now, the next thing: Is there any question in Mr. Brown's mind that we are purely and totally a private school, with no federal or state funds involved in any way?
I want the record clear on that.
THE COURT: I didn't think there was any issue on that.
MR. BROWN: That's not in issue.
MR. KOUTOULAKOS: That's what I wanted. So the record will show we are purely and totally a private institution.
MR. McDONALD: And that agreement also is with respect to Fairfax-Brewster, too, I assume.
THE COURT: That's the understanding of the Court.

* * * * *

356 WILLIAM C. GATES, called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOUTOULAKOS:
Q. Mr. Gates, you want to state your full name, please. A. William Charles Gates.
Q. And what is your occupation? A. Superintendent, Bobbe's School.

Q. How long have you been in that capacity? A. Eleven years.

Q. And where is the Bobbe School located? A. 820 South Carlyn Spring Road in Arlington.

Q. Now, quite briefly, so we don't build up the record on items that are not material, what is Bobbe's School? A. Bobbe's School is a development for preschool education, offering for early childhood development, and also
357 extends its program into the first and second grade.

Q. Now, pursuant to a request by the plaintiffs in this case to supply them with your brochures and entrance requirements and other information, you supplied that; is that not correct? A. I supplied brochures and information to anybody who requested it by telephone.

Q. No. I am talking about: you supplied the plaintiffs here and we supplied him and the Court with what is necessary for entrance and what you all require? A. Yes.

Q. Now, you heard the testimony here by a Mr. and Mrs. Gonzales to the effect that sometime in '69 – they are not clear of the month – that a phone call was made to your private school regarding questioning about entrance opportunities for a youngster.

Were you in the school at that time? A. I don't know. When was the time, exactly?

Q. Sometime in '69, whenever it was. A. I possibly could have been. I am in and out of there and also the camp.

Q. Now, did you ever receive such a call from anybody by the name of Gonzales? A. Never.

358 Q. Now, is the policy of the school to exclude black children per se just on the basis of race? A. No, I can't say so.

Q. How is an applicant's qualifications and entrance

for qualification determined, Mr. Gates? A. Well, after they have taken out their application and come back to the school, we go over the particular program the child's going to get into and then we make a placement for starting if we have a particular opening in our classroom, after verification of the application that's submitted along with the health certificate and the registration fee.

Q. Now, before I pass on, you heard Mrs. McCrary, the lady that testified yesterday regarding a phone call she made.

Did you ever receive such a phone call from any person by the name of McCrary at any time? A. Not to my knowledge, I have never –

Q. Have you ever been told, or have you ever told anybody, that your school is not integrated? A. No, because we are. We have various children, from all nationalities.

Q. Well, tell His Honor or state for the record just what various types of reaces have been included and accepted in
359 your school. A. Well, we have had Arabic; we have had French; we have had Spanish; we have had Rissian children.

Q. Do you have any Greeks in there? A. Yes, we probably have, too. We have just about all nationalities in the school.

Q. Now, in order for a youngster to be considered, what are the steps that have to be taken, regardless of race? A. Well, as I stated just a few minutes ago, a person either calls or comes by the school and applies for an application. They pick up their application. At that time, if we can talk about the interview, we will. If not, we will set a definite time up, convenient to class schedules, because the students or parents, or both of us, will want to visit the class to make observation, to see whether the child is particularly ready for the class we are going to

put the child into. After this, if we have an opening in the particular class the child is going to, whether it be in the nursery development, kindergarten or first or second grade, then we place up a starting date according to the cancellation times we have from students leaving. After they have done this, they complete their application, their registration fee, their doctor's certificate, and we submit the child to the classroom.

Q. Can any youngster ever be considered without first
360 going through the formal filling out routine and the medical certificate and the personal interview and the rest of the requirements that your brochure sets out?

Would any youngster every be considered without going through that process? A. I don't see how they could be because, first of all, Fairfax County requires a health certificate for a child to enter school, which is one of the reasons why we have to have a health certificate to come in. The other step would be to fill out the application for placement and then the child would have to come into shcool and to see and observe the child in the classroom.

Q. Has any black child ever been denied consideration purely on the basis of race? A. We never had a black child apply to the school.

Q. Assuming a black child does apply, would they be denied any consideration purely on the fact that he's black? A. No, I don't see why they should be.

Q. Would he be considered on the same basis as any youngster? A. Any race that came in there.

Q. Whether it be Caucasian or Oriental? A. That is correct.

Q. Then are you saying the determination of admis-
361 misability is determined by the same requirements? Is that correct? A. That's correct. We are selective

of the students that come into the school.

Q. Had you ever heard or known of Mrs. McCrary prior to this lawsuit, Mr. Gates? A. No, I have not.

Q. How about Mr. or Mrs. Gonzales? A. No, I have not.

Q. As a matter of fact, didn't it come to your attention that Mrs. McCrary worked at an establishment that was almost next door to your school? A. Yes, it did.

Q. She worked right next to it, didn't she, – A. That's right.

Q. – in a Navy building?

So she was, from what you could gain, very familiar with what took place in that school; is that not correct? A. I would say she was, if she was that close to the school.

Q. And she left, as far as you know, that Navy job, or whatever it was, prior to her getting this equal opportunity job she's talking about? A. That I'm not sure.

362 Q. Do you every accept any children purely on the basis of a phone call? A. We do not. It's not a policy of the school.

Q. And that's regardless of race, right? A. Regardless of anything.

Q. The record speaks for itself, but is there any place in any of your forms that are required to be filled out that has any question regarding what race a party might be? A. No, we do not.

Q. It's blank of any race? A. We don't have it on the application.

Q. And it is your testimony that the only basis that you have for entrance is purely a selective basis based on whatever criteria you set out, independent of race?

A. This is correct. Right.

MR. KOUTOULAKOS: He is your witness.

CROSS-EXAMINATION

BY MR. BROWN:

Q. Do people call your school from time to time and ask for information about the school, without giving their names? A. This is correct.

Q. Is it possible that Mr. Gonzales or Mrs. McCrary
363 called and asked for information about the school without giving their name? A. It's possible anybody could.

* * * * *

MR. KOUTOULAKOS: Your Honor, the next witness will be Mrs. Runyon, who will be exactly corroborative, and she will testify further, if he is willing to stipulate, that she never received a phone call. The only other person that has any authority at all in the acceptance area would be Mrs. Runyon. She would testify exactly in the same vein as Mr. Gates; and if he is willing to stipulate, fine. If not –

THE COURT: Will Mr. Brown stipulate that if Mrs. Runyon were called to testify, that she would corroborate the witness who has just testified?

MR. BROWN: Yes.

MR. KOUTOULAKOS: And would further say that, in the absence of Mr. Gates, Mrs. Runyon would be taking the calls and that Mrs. McCrary never called, to her knowledge, and neither did Mrs. Rodriguez or Mr. Gonzales or Mrs. Gonzales.

* * * * *

372 MARSHALL BROOKES, called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BROWN:

Q. Will you state your name and address, please.

A. My name is Marshall Brookes, and my working address is the Naval Air Systems Command Headquarters in
373 Arlington, Virginia, my home address being Baltimore, Maryland.

Q. What is your occupation and what do you do at the Naval Air Systems Command? A. Well, my occupation is that of deputy equal employment opportunity officer with the Naval Air Systems Command; also, I have another title: the domestic action program coordinator, and basically my function is to insure that for 1800 people in Washington and for about 50,000 throughout the country that we practice the provisions of equal opportunity as defined by the Civil Service Commission and the Department of Navy.

Q. What is your educational background, Mr. Brookes?

A. Well, I am a graduate of Morgan College in Baltimore.

Q. With what kind of a degree? A. A degree in sociology; Bachelor of Arts degree in sociology.

Q. Do you know the plaintiff in this case: Mrs. McCrary? A. Yes, I do.

Q. In what connection? A. Well, MRS. McCrary is an employee of mine.

374 Q. She is an employee of yours? A. Yes.

Q. And how does her job relate to yours; that is, does she do the same kind of work that you do or –

A. Well, basic –

MR. KOUTOULAKOS: I don't want to cut you off. This isn't rebutting anything. If he will get to the rebuttal, we will finish the case. He is just corroborating she works there. We don't fuss with that.

THE COURT: I think you better get to the rebuttal.

MR. BROWN: I will.

Scratch that or strike the last question, then.

BY MR. BROWN:

Q. Had you discussed this pending lawsuit, in which Mrs. McCrary is a plaintiff, with her? A. Yes.

Q. And did there come a time when you were concerned about the lawsuit and took some action with respect thereto? A. Yes.

Q. What did you do? And explain why. A. Well, basically, with the amount of publicity there, I was
375 concerned mainly from the point of view that part of our headquarters is located adjacent to the Bobbe Day-Care Center and part of our policy with the federal government is that we provide day-care centers for our working mothers, and with the Chief of Naval Material Command, which we come under, we are to actively try to promote day-care centers; and where there are none, we are to make available lists to our employees places where they will be eligible and will be allowed to take their children.

Q. Did you ever place a phone call to Bobbe's Private School? A. Yes, I did.

Q. When? A. On May 31st.

Q. Of what year? A. May 31, 1973.

Q. Do you know who you spoke to? A. Yes.

Q. What was the person's name? A. A Mr. Gates.

Q. Did he identify his relationship with the school?

A. Well, I don't know the exact words, but when the

operator answered the phone, I asked to speak to the headman, superintendent, or something. He's identified
376 as the superintendent.

Q. Will you relate what happened in the phone call; what you said to him and what he said to you? A. Right. I identified myself: I was Marshall Brookes with the federal government, and we were looking for the various day-care centers in the Washington area.

We have various people coming in, both – well, we have people coming into the Washington area to reside, and we were trying to know the various day-care centers that we could have as a list for our people.

Q. And – A. Well, –

Q. Proceed. A. – to continue, I mentioned that there were two questions I would raise. One would be whether the center was accredited by the municipality of Virginia; and, secondly: Was it integrated?

And I went a step further to state the "Many of our people are black. And so, therefore, is the day-care center integrated?" And I was informed that it was not. And I raised the question that, "Are you planning on integrating any time soon?" And the answer was to the negative, that they did not intend to integrate.

* * * * *

396 You heard Mr. Brookes' testimony about calling, and he said he talked to you.

Do you recollect any such conversation? A. I don't recollect a gentleman by the name of Mr. Brookes calling me, but a gentleman did call me and we discussed things of this nature.

Q. Now, was there any discussion at all as to whether or not you were integrated? A. Well, as I recall correctly, the question arose, "Are you integrated? Do you have any blacks?"

Q. And what did you answer to that? A. I'd have to answer "no," because we didn't at that time.

Q. Meaning what? You didn't – A. Meaning we didn't have blacks in the school.

Q. You didn't answer the question whether you were integrated or you didn't accept blacks? A. That's correct, because we are integrated.

Q. Is your answer the same as to a black application? Would that be accepted? A. It would be accepted if the person went through the normal procedures as any other person.

* * * * *

Supreme Court, U. S.
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Nos. 75-62, 75-66, 75-278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

RUSSELL L. RUNYON, *et al.*,
Petitioners,

v.

MICHAEL C. McCRARY, etc., *et al.*,
Respondents.

FAIRFAX-BREWSTER SCHOOL, INC.,
Petitioner,

v.

COLIN M. GONZALES, etc., *et al.*,
Respondents.

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,
Petitioners,

v.

MICHAEL C. McCRARY, etc., *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	3
ARGUMENT	5
CONCLUSION	6

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No. 75-62

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION[1]

OPINIONS BELOW

The opinion of the court of appeals, sitting *en banc*, and its order amending the opinion are reported at 515

[1] This brief is in response to three petitions for certiorari seeking review of a single opinion by the court of appeals entered in five consolidated cases. Respondents herein have cross-petitioned for a writ of certiorari (*Michael C. McCrary, etc., et al. v. Russell L. Runyon, et al.*, No. 75-306, October Term, 1975).

F.2d 1082. The memorandum opinion and order of the district court which issued July 27, 1973, is reported at 363 F. Supp. 1200.

JURISDICTION

The judgments of the court of appeals in the consolidated cases were entered on April 15, 1975. Petitions for rehearing were denied by order of the court of appeals filed on May 29, 1975. The petitions for a writ of certiorari were filed on July 10, July 11, and August 22, 1975, respectively. The Clerk of the Court by letter to respondents' counsel dated August 1, 1975, extended the time for filing this brief in opposition to and including 30 days after the third petition for certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 42 U.S.C. Sec. 1981 prohibits private schools from denying admission to qualified black students on the basis of their race.

STATUTE INVOLVED

42 U.S.C. Sec. 1981 provides as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and extractions of every kind, and to no other.

STATEMENT

In early May 1969, the parents of Colin Gonzales, a black child, contacted Fairfax-Brewster School, a private school located in Fairfax County, Virginia, about enrolling Colin in the school's summer day camp program, and continuing in the first grade in the fall. The Gonzales' had learned of the school through an advertisement in the Yellow Pages of the telephone directory, through a mass mailing from the school addressed to "Resident" and from a friend whose son attended the summer camp. Thereafter, the Gonzales' visited the school with Colin, and completed an application form for his admission. They also furnished, as required, a medical certificate and application fee. On May 16, 1969, the medical certificate and fee were returned to the Gonzales' accompanied by a form letter stating that the school was "unable to accommodate the application." No further explanation was given. Mr. Gonzales called the school and spoke to someone identified as Captain Stuart Reiss, Chairman of the Board. In response to Mr. Gonzales' inquiry as to why his son's application was rejected, he was told that the school was not integrated.

Subsequent to his son's rejection by Fairfax-Brewster School, Mr. Gonzales telephoned Bobbe's Private School. This school, which is located in Arlington County, Virginia, advertises in the Yellow Pages, and also solicits students by direct mail advertising. In response to his

inquiry about enrolling his son, Mr. Gonzales was told that only members of the Caucasian race were accepted.

In August 1972, the mother of Michael McCrary, a black child, called Bobbe's School about enrolling him in the nursery school program. She asked whether the school was integrated and accepted blacks, and was told it did not.

The district court concluded that Colin Gonzales and Michael McCrary were excluded from the schools and day camp operated by the defendants because they are black, and that the rights of the two children and their parents under 42 U.S.C. Sec. 1981, were thereby violated. The district court enjoined the defendants from continuing to discriminate concerning the admission of students on the basis of race. The court also awarded compensatory damages for the embarrassment, humiliation and mental anguish suffered by the plaintiffs, as well as attorneys' fees. Fairfax-Brewster School was ordered to pay $2,000 damages to Colin Gonzales and $1,000 attorneys' fees. Bobbe's School was ordered to pay $1,000 damages to Michael McCrary, $2,000 to his parents, and $500 to Colin Gonzales, as well as $1,000 attorneys' fees. The court denied damages to Mr. and Mrs. Gonzales on the ground that their suit was filed three and one-half years after the discrimination against them occurred and that their claims for damages against the schools were therefore barred by Virginia's two-year statute of limitations. Sec. 8-24, Code of Virginia (1950).

The court of appeals, sitting *en banc* and with three judges dissenting, found "ample evidence" in the record to support the district court's factual findings that Colin Gonzales and Michael McCrary were excluded from the

two schools on grounds of race. The court of appeals also agreed with the district court's conclusion that plaintiffs' rights under 42 U.S.C. Sec. 1981 were thereby violated. The court of appeals affirmed the district court's award of damages to the individual plaintiffs, as well as the denial of damages to Mr. and Mrs. Gonzales on the ground that their claims were barred by Virginia's two-year statute of limitations. Finally, the court of appeals, with three judges dissenting, reversed the district court's award of attorneys' fees to plaintiffs. The three judges dissenting on this issue would have affirmed the award of fees to plaintiffs under the "bad faith" exception to the general rule that such fees are not awarded to a prevailing litigant.

ARGUMENT

Respondents agree with the court of appeals' conclusion that 42 U.S.C. Sec. 1981 prohibits private schools from denying admission to qualified black students on the basis of their race. The opinion of the court fully explicates the basis for its decision, and respondents concur in the court's reasoning. Accordingly, respondents believe that the question, as stated above (p. 2), which is principally presented by these three petitions was correctly answered in the affirmative by the court of appeals and its decision in this regard should be allowed to stand.

CONCLUSION

The petitions for a writ of certiorari should be denied. Respectfully submitted.

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR CERTIORARI FILED JULY 10, 1975
CERTIORARI GRANTED NOVEMBER 11, 1975

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement of Facts	2
Legal Argument	6
Conclusion	15

TABLE OF CITATIONS

CASES:

The Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 836 ..... 7, 10, 15
Moose Lodge v. Irvis, 92 S.Ct. 1971 ..... 8, 12, 15
Cook v. Advertiser Co., 323 F.Supp. 1212 8
Jones v. Mayer Co., 88 S.Ct. 2186, 392 U.S. 409 .. 8, 9, 12, 14
Katzenbach v. Morgan, 86 S.Ct. 1717, 384 U.S. 641 ... 9
Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S.Ct. 856 10
Adickes v. S. H. Kress & Co., 90 S.Ct. 1598, 398 U.S. 144 (1970) 10
Norwood v. Harrison, 93 S.Ct. 2804 ..... 10, 15
Grossner v. Columbia Union, 298 F.Supp. 535 10
Browne v. Mitchell, 409 F.(2d) 593 10
Tillman v. Wheaton Recreation Assoc., 41 U.S.C.W. 4311 10
Pierce v. Society of Sisters, etc., 45 S.Ct. 571, 268 U.S. 510 ..... 11, 15
Wisconsin v. Yoder, 92 S.Ct. 1526 ..... 12, 15
Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 29 ALR 1146 ..... 12, 13
Griswold v. Conn., 85 S.Ct. 1678, 381 U.S. 479 (1965) 12
Olmstead v. U.S., 48 S.Ct. 564, 277 U.S. 438 13
McCrary v. Runyon, 363 F.Supp. 1200 14
Gilmore v. City of Montgomery, 417 U.S. 556 14

	Page
MISCELLANEOUS:	
28 U.S.C. § 1254(1)	1
42 U.S.C.A. § 1981	2, 5, 6, 8, 9, 10, 12, 14
42 U.S.C. § 2000a	2
28 U.S.C. § 2403	5
42 U.S.C. § 1982	9
Civil Rights Act of 1866	6, 7, 8
Civil Rights Act of 1870	6, 7, 8
Thirteenth Amendment	6, 7, 9
Fourteenth Amendment	6, 7, 9, 10, 12, 13
Cong. Globe, 39th Cong., 1st Sess. 409 (1866)	6
Gressman, Civil Rights Legislation	7
Fifth Amendment	10
Tenth Amendment	10-11
First Amendment	2, 12
Ninth Amendment	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-62

RUSSELL L. RUNYON, et ux, *Petitioners,*

v.

MICHAEL C. MCCRARY, etc., et al, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONER'S BRIEF

OPINIONS BELOW

The U.S. District Court Memorandum Opinion and the U.S. Court of Appeals (515 F.(2d) 1082), are part of the Appendix of the Petition for Certiorari, as Exhibits B and C, respectively.

JURISDICTION

Jurisdiction is invoked under Title 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

I 42 U.S.C.A. § 1981 Has No Application To Private Conduct. Congress Never Intended To Infringe On Private Acts. The Contract Clause of § 1981 Does Not Prohibit Private Discrimination.

II The Right of Parents and Private Schools To Freedom of Choice As To Admission Policies and Private School Selection Is A Constitutionally Protected Right By Virtue of the First Amendment.

III 42 U.S.C.A. § 1981 As Interpreted By the Court Is Unconstitutional, Class Legislation, Or Unconstitutionally Applied. It Is Beyond the Power of Congress To Legislate Against Purely Private Conduct.

STATUTES INVOLVED

42 U.S.C.A. § 1981 (Appendix Exhibit A of the Petition for Writ of Certiorari).

STATEMENT OF FACTS

The following, in brief, is a review of the material facts involved:

A joint action for injunctive relief and damages was brought against Russell L. Runyon and Katheryne E. Runyon, d/b/a Bobbe's Private School, on behalf of Michael McCrary, an infant, by his parents, and Colin M. Gonzales, an infant, by his parents. The complaint, initially, was based on alleged violations of Civil Rights Statutes Act of 1866 (42 U.S.C. § 1981) and Civil Rights Act of 1964 (42 U.S.C. § 2000a), alleging discrimination against the Negro or non-Caucasian race in its admission policies.

Bobbe's filed its responsive pleadings, including appropriate motions.

A similar suit was filed against the Fairfax-Brewster School, Inc., on identical grounds.

The two cases were consolidated for trial. The Southern Independent School Association was allowed to intervene.

Bobbe's School is an independent private school, located in Arlington County, Virginia, an area that maintains a very fine public school system. It is a small school with an enrollment of approximately 155 children. It was founded in 1958 by Mrs. Runyon. It provides a nursery, pre-kindergarten, kindergarten, first and second grade programs.

Admission to the private school requires a formal application, personal interview, physical examination, and registration fee.

The trial was held in the U.S. District Court for the Eastern District of Virginia, Alexandria Division, the Honorable Judge Albert V. Bryan, Jr., presiding.

The plaintiffs introduced evidence on their behalf and insofar as it deals with Bobbe's School, Mr. Gonzales testified that he had formally applied to Fairfax-Brewster in 1969, for his young son's admission, which was eventually denied. He subsequently made one phone call to Bobbe's School, and inquired about its admission policies.

He stated he was informed about the formal application requirements. That he inquired about its integration policy and upon allegedly being told that it was not integrated, did nothing further. This was the only

time he ever called or had any contact with Bobbe's, and although he was advised of the need to make formal application, he never did. Mrs. Gonzales corroborated her husband, admitted she never called or had any contact with the school. Mr. and Mrs. Gonzales further related they neither informed their young son about Bobbe's School, nor discussed any of the conversation with him. That the youngster was well adjusted, was immediately placed in another private school, Congressional, thereafter to a Catholic school, and finally a public school, losing no time from school. Mr. Gonzales further admitted he did not identify himself and did not tell the person he was talking to that he was black. That was in 1969, he brought suit in 1972.

Mrs. McCrary testified, insofar as is material, that sometime in 1972 she called Bobbe's School. She inquired about its admission and integration policy. That her son was 2 years old. That she was advised about the need for formal application. She further said she made no formal application after allegedly being told blacks were not admitted. Mr. McCrary testified he was in the room when his wife called. He never called or talked to anyone at the school. That no formal application was ever made. That they never told their young son about the call. This one phone call was the only contact ever made.

Two other witnesses were produced to testify regarding the alleged exclusion of blacks.

Mr. Gates testified on behalf of Bobbe's Private School. That he was superintendent of the school in 1969 and 1972. That he could not recall any calls from either party. He testified as to the type of school Bobbe's was, and to its admission policies. That the school

was integrated. That all applicants were treated alike, requiring formal application, interview, and a medical certificate. That the school was selective, that whites had been rejected. No one was accepted on the basis of a phone call, and no black had ever applied.

It was stipulated by the parties that Mrs. Runyon, the founder, would testify in corroboration of Mr. Gates' testimony.

Counsel for the McCrarys and Gonzaleses waived and dismissed any claims under any Civil Rights Act except 42 U.S.C. § 1981. They further stipulated that Bobbe's was a private school, with no state involvement, and was not supported, in any way, by local, state, or federal funds or assistance. It existed entirely on funds derived from its students.

The district court, at the conclusion of the presentation of all the evidence, and after hearing argument, took the case under advisement. It rendered a memorandum opinion and judgment order.

On appeal the judgment was affirmed in part and reversed in part by a divided court, in a 4-3 opinion.

The constitutionality of an Act of Congress is being questioned, therefore, 28 U.S.C. § 2403 is applicable. The U.S. Solicitor General has been served with copies of the petition for writ of certiorari.

LEGAL ARGUMENT

I

42 U.S.C.A. § 1981 Has No Application to Private Conduct. Congress Never Intended To Infringe on Private Acts. The Contract Clause of § 1981 Does Not Prohibit Private Discrimination.

The determination by the trial court and by the majority of the court of appeals, that § 1981 reached private conduct (private schools), is clearly erroneous.

42 U.S.C.A. § 1981 provides in pertinent part that:

> "All persons within the jurisdiction of the United States shall have the same right to make and enforce contracts . . . as is enjoyed by white citizens . . ."

Section 1981 came into being as a direct result of the reconstruction era attempts to legislate in the field of Civil Rights. It thus owes its existence to the Civil Rights Act of 1866, 1870, and the Thirteenth and Fourteenth Amendments.

The Thirteenth Amendment came into being to abolish slavery and involuntary servitude in all the states. Problems in achieving its desired effects brought about the Civil Rights Act of 1866.

The Civil Rights Act of 1866 was viewed by many as an infringement upon the state's power over contracts and property. Concern over the constitutionality of the 1866 Act and the Thirteenth Amendment brought about the Fourteenth Amendment. The Thirteenth Amendment had as its purpose the elimination of any form of slavery and involuntary servitude. The Congressional Record of the debates clearly attests to this. [Cong. Globe, 39th Cong., 1st Sess. 409 (1866.)] The Equal

Rights Amendment, commonly known as the Fourteenth Amendment, thus came into being. As a matter of fact, the provisions of the 1866 Act were meant to be incorporated into the Fourteenth Amendment. [Gressman, *Civil Rights Legislation,* at p. 1329.] Due to concern over the legality and constitutionality of the Thirteenth Amendment and the Civil Rights Act of 1866, the Civil Rights Act of 1870 was enacted. This Act, coming after the Fourteenth Amendment, reenacted the entire Civil Rights Act of 1866. [S. 810, 41st Cong., 2d Sess. (1870).]

The Fourteenth Amendment struck at any state action directed against deprivation of civil rights.

The U.S. Supreme Court in 1883 clearly decided that private discriminatory acts were not prohibited by the Constitution. [*The Civil Rights Cases*, 109 U.S. 3.]

The Honorable Justice Bradley at 109 U.S. p. 30, held, in part:

> "We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different: the former simply abolished slavery; the latter prohibited the states from abridging the privileges or immunities of the United States . . ."

and at p. 21 (id.):

> "Individual invasion of individual rights is not the subject matter of the amendment . . . and it does not invest Congress with power to legislate over subjects which are within the domain of state legislation . . ."

and at p. 22 (id.):

> "... Take the subject of contracts, for example. The Constitution prohibited the states from passing any law impairing contracts. *This did not give to Congress power to provide laws for the general enforcement of contracts ...*"

and at p. 25, in alluding to the Civil Rights Bills of 1866 and 1870:

> "... This law is clearly corrective in its character ... intended to furnish redress against state action ..."

and goes on to say that individual wrongs unaided by state action are private wrongs and do not come under civil rights protected by the Constitution.

In the case at bar, it was conceded that Bobbe's is a private institution, operated on private property, by private owners with private funds, and attended by children of parents who, in the exercise of their freedom of choice, placed them in such a school. There is no constitutional right to a private school education. Concomitantly it would seem, a private school, like a private club, should have the same right to discriminate. As this Honorable Court said in *Moose Lodge* v. *Irvis*, 92 S.Ct. 1971 (citing the Civil Rights Cases), the Constitution erects no shield against private conduct, however discriminatory.

A federal court, in the case of *Cook* v. *Advertiser Co.*, 323 F.Supp. 1212, discussed in detail the purpose and rationale of § 1981. It pointed out the historical background of § 1981, alluded to the *Jones* v. *Mayer Co.* case (88 S.Ct. 2186, 392 U.S. 409), and concluded, after some very perceptive analysis and review of the Congressional debates on this provision, that it was intended to apply to state action only. The Fourteenth

Amendment certainly was tied in to state action (*Katzenbach* v. *Morgan*, 86 S.Ct. 1717, 384 U.S. 641).

Jones v. *Mayer* (392 U.S. 409) seems to be the bedrock regarding private discrimination. First, it should be pointed out that this case dealt with the right to purchase real estate, a non-exclusive commercial transaction. Certainly this relationship cannot be compared to a private education relationship, that is highly personal. Like a contract of marriage, can it be seriously argued that § 1981 demands the acceptance of a request to enter into matrimony, against the wishes of the other party? It may sound absurd, but if it can be seriously contended that § 1981 gives an unabridged contractual right, even absent mutuality, then a refusal could bring into play § 1981.

At this point, it should be noted that the dissent in *Jones* v. *Mayer*, by the Honorable Justices Harlan and White, delve into the historical background, rejecting the view that private discrimination absent state action is constitutionally prohibited. This opinion, alluding to the history of the sections 1982 and 1981, the Thirteenth Amendment, the Congressional debates, the Civil Rights Cases, the prior legal precedent, the Fourteenth Amendment, all point out the need for state action. It would appear then, to interpret § 1981 as the lower courts did, is tantamount to acting in a legislative and philosophical capacity.

The effect of such a decision would, for all practical purposes, eliminate the private school's status, and thus turn them into *de facto* public schools.

It would be presumptuous and needless to cite all the authorities dealing with the Thirteenth and Fourteenth Amendments and the need for public as against

private discrimination. In all the cases decided dealing with civil rights, that this writer has read, it s apparent that they dealt with non-private establishments and substantial state involvement. (See *Burton* v. *Wilmington Parking Auth.*, 365 U.S. 715, 81 S.Ct. 856. Also *Adickes* v. *S. H. Kress & Co.*, 90 S.Ct. 1598, 398 U.S. 144 [1970].)

It is submitted that § 1981 does not and could not reach private conduct. *Norwood* v. *Harrison*, 93 S.Ct. 2804, in striking down a state law, in essence held that private schools have a right to exist and operate, and absent state involvement a purely private school can have discriminatory policies and not be in violation of the Constitution. *Grossner* v. *Columbia Union*, 298 F. Supp. 535; *Browne* v. *Mitchell*, 409 F.(2d) 593.)

In *Tillman* v. *Wheaton Recreation Assoc.* (41 U.S. C.W. 4311), this court specifically held that the case did not involve a private club. And in *Burton* v. *Wilmington Parking Auth.*, 365 U.S. 725, this court again held that private conduct abridging constitutional rights does not violate the Fifth or Fourteenth Amendments absent significant state involvement.

Absent any state action, Congress is not invested with any power to enact rules for the conduct of individuals toward each other. For, as this Honorable Court pointed out in the *Civil Rights Cases*, 22 S.Ct. at pp. 33, 34:

> "If such legislation is appropriate for enforcing the prohibition of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority, enact a code of laws for the enforcement and vindication of all rights of life, liberty and property? . . . The assumption is certainly unsound. It is repugnant to the Tenth

> Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

The right of a private school to select its pupils is equated to the right of a person to choose whom he wishes to associate with. It in no way is related to slavery or to equal protection. It's a private right and should be kept that way. If not, then, where does it stop? In the case at bar, the evidence was clear, and unrebutted, that Bobbe's School has selective and exclusive standards for admission, thus outside the scope of any decided precedent.

II

The Right of Parents and Private Schools to Freedom of Choice as to Admission Policies and Private School Selection Is a Constitutionally Protected Right by Virtue of the First Amendment.

A public school education is certainly clothed with a public interest and is constitutionally protected. Therefore discrimination in any form cannot be tolerated in this area. Every child has a right, within limits, to a public school education.

However, there is no right, civil or constitutional, to demand a private school education. It has been decided, by this court, that the task of educating is a parent's right, by virtue of the First Amendment to the Constitution, expressing itself in a freedom of choice and association.

In *Pierce* v. *Society of Sisters, etc.* (45 S.Ct. 571, 268 U.S. 510), this court, in affirming the enjoining of the enforcement of an Oregon state compulsory educa-

tion law, held that the parents have the right to direct the upbringing and education of their children and that they could not be forced into a public school education as against the wishes of the parents to enter them in a suitable private school.

And in *Wisconsin* v. *Yoder,* 92 S.Ct. 1526, this court again upheld the First and Fourteenth Amendment rights of parents to rear and educate their children, subject, of course, to reasonable regulation to promote health, safety, and general welfare. (See also *Meyer* v. *Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 29 ALR 1146.)

Thus, it would seem, the right protected by the Constitution does not include the right, by use of the "contract" clause, to demand a private school education, absent concurrence by the private school.

The need for a balancing of constitutional interests is rather apparent, and the right to contract that is alluded to in § 1981 should not be interpreted to deprive and eliminate friendship, association, personal relationships, freedom of choice, and selectivity.

This then could reconcile the result of the *Jones* v. *Mayer* case and the *Moose Lodge* v. *Irvis* case. In addition, it preserves the right to privacy, freedom of choice, and liberty, as meant to be in a free society.

In *Griswold* v. *Conn.,* 85 S.Ct. 1678, 381 U.S. 479 (1965), this court, in striking down a Connecticut law, came down hard in favor of the right of privacy, as being a basic, fundamental and protected right.

It alluded to the right of association, the right to educate a child in a school of the parents' choice, whether public or private. Freedom to teach, to express ideas. And at p. 1681, id., the court quoted from the Ninth Amendment provision as follows!

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

In *Meyer* v. *Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 626, 627, this court viewed the guarantee of the Fourteenth Amendment, although not definable in precise detail,

> ". . . Without doubt, it denotes not merely freedom of bodily restraint but also (for example) the right to marry, establish a home and bring up children."

Also it could have said this right to choose for their children any school of their choice, for any reason, includes a private school with discriminatory policies. Armed with that right, then certainly, by changing the standards set by that school, it in effect deprives the parents of that right.

There are ample public and private schools open to any pupil, of any race, creed, or religion, for any parent subscribing to any philosophy.

Mr. Justice Brandeis in his dissent in *Olmstead* v. *U.S.,* 48 S.Ct. 564, 572, 277 U.S. 438, put his finger on it as follows:

> ". . . The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They conferred, as against the government, *the right to be let alone*—the most comprehensive of rights and the right most valued by civilized men."

III

42 U.S.C.A. § 1981 as Interpreted by the Court is Unconstitutional, Class Legislation, or Unconstitutionally Applied. It Is Beyond the Power of Congress to Legislate Against Purely Private Conduct.

Our Constitution has been referred to as the greatest instrument ever, for a democratic form of government. Its very purpose is to guarantee every person equal rights, and cannot be reserved to apply to special groups or special interests or classes.

This Honorable Court in the *Civil Rights Cases* (id.), held that Congress did not have the power to provide laws for the general enforcement of contracts. The court further pointed out that class legislation is prohibited. The Civil Rights Act itself deals with public accommodations and not, since it could not, deal with private establishments.

The district court, in its opinion decided that § 1981 only restricts whites and has no application to any other race. (See footnote district court's opinion, 363 F.Supp. 1200, at p. 1204.) As the dissent ably points out in *McCrary* v. *Runyon*, No. 73-2348 U.S.C.A. 4th Cir., at p. 33, that this certainly is an unconstitutional application of the statute, assuming it is constitutional.

Constitutional amendments and federal statutes dealing with race and color cannot be interpreted to discriminate in favor of Negroes, but to prevent discrimination, and then in areas that the lawmakers have power to legislate.

The dissent in *Jones* v. *Mayer* (id.), and *McCrary* v. *Runyon*, point up the constitutional infirmities of this section. (See also *Gilmore* v. *City of Montgomery*, 417 U.S. 556.)

And again, citing the *Civil Rights Cases*, 20 S.Ct. at p. 21, that the legislative power of Congress is not invested with the power to create a code of municipal laws for the regulation of private rights.

CONCLUSION

The Constitution of the United States was never meant to apply to private conduct. It cannot be used as a sword to deprive individuals of individual rights, such as freedom of choice, of association, of expression, the right of privacy, or the right of a private school to be selective.

Certainly the reasoning in *Pierce, Yoder, Moose Lodge*, should apply with equal force to private schools. As the Honorable Justice Douglas said in *Moose Lodge*, people do have a right to band together with whomever they please. This is a private right. And finally, as this Honorable Court said in *Norwood* v. *Harrison*:

> "Such private bias is not barred by the Constitution, nor does it invoke any sanction of the laws, but neither can it call on the Constitution for material aid from the state." 413 U.S. 455, 469.

The majority opinion of the Court of Appeals should be reversed and the case dismissed.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

RUSSELL L. RUNYON, *et ux*, *Petitioners*,

v.

MICHAEL C. McCRARY, etc., *et al.*, *Respondents*.

FAIRFAX-BREWSTER SCHOOL, INC., *Petitioner*,

v.

COLIN M. GONZALES, etc., *et al.*, *Respondents*.

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION, *Petitioner*,

v.

MICHAEL C. McCRARY, etc., *et al.*, *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISION AND STATUTE INVOLVED	2
STATEMENT	3
A. Fairfax-Brewster School – its racially discriminatory admission policy	4
B. Bobbe's Private School – its racially discriminatory admission policy	5
C. Proceedings below	7
SUMMARY OF ARGUMENT	8
ARGUMENT	13
I. Privately owned educational institutions are prohibited by 42 U.S.C. Sec. 1981 from denying admission to qualified black students on the basis of their race	13
A. Section 1981's proscription against racial discrimination is applicable to privately owned schools	13
B. There is no valid reason to exempt privately owned schools from Section 1981	23

Page

1. The decisions below accord with this Court's teachings in the *Sullivan* and *Tillman* cases 23

2. Governmental regulation of nonpublic schools is commonplace 28

3. There is no constitutional reason why Section 1981 is inapplicable to non-public schools 34

II. The injunctive relief granted by the district court against Fairfax-Brewster School is valid and proper 43

CONCLUSION 47

CITATIONS

Cases:

Amerson v. Jones Law School,
Civil Action 3343-N (M.D. Ala.,
August 10, 1972) 21

Barnett v. W.T. Grant Company,
518 F.2d 543 (C.A. 4, 1975) 45

Bowe v. Colgate-Palmolive Co.,
416 F.2d 711 (C.A. 7, 1969) 44

Brown v. Board of Education,
347 U.S. 483 (1954) 19

Brown v. Dade Christian Schools, Inc.,
No. 73-1313-Civ-JE (S.D. Fla., May 27, 1975) 42

Page

Civil Rights Cases,
109 U.S. 3 (1883) 14

Cook v. Advertiser Company,
323 F. Supp. 1212 (M.D. Ala., 1971),
aff'd, 458 F.2d 1119 (C.A. 5, 1972) 18

Davis v. Beason,
133 U.S. 333 (1890) 43

District of Columbia v. Carter,
409 U.S. 418 (1973) 14

Eisenstadt v. Baird,
405 U.S. 438 (1973) 40

Gilmore v. City of Montgomery,
417 U.S. 556 (1974) 39

Green v. Connally,
330 F. Supp. 1150 (D.D.C., 1971),
aff'd sub nom. Coit v. Green, 404 U.S. 997 . . . . . 37, 38

Grier v. Specialized Skills, Inc.,
326 F. Supp. 856 (W.D. N.C., 1971) 21

Griffin v. Breckenridge,
403 U.S. 88 (1971) 38

Griswold v. Connecticut,
381 U.S. 479 (1965) 40

Healy v. James,
408 U.S. 169 (1972) 39

Heart of Atlanta Motel v. United States,
379 U.S. 241 (1964) 17

Page

Hernandez v. Erlenbusch,
368 F. Supp. 752 (D. Ore., 1973) 22

Johnson v. Railway Express Agency,
421 U.S. 454 (1975) 13, 14, 15, 22, 26, 29

Jones v. Mayer Co.,
392 U.S. 409 (1969) 13, 14, 15, 16, 21, 26

Oatis v. Crown Zellerback Corp.,
398 F.2d 496 (C.A. 5, 1968) 44

Meyer v. Nebraska,
262 U.S. 390 (1923) 30

Meyerkorth v. State,
173 Neb. 889, 115 N.W.2d 585 (1972) 32, 33

NAACP v. Alabama,
357 U.S. 449 (1958) 39

N.L.R.B. v. Bell Aerospace Co.,
416 U.S. 267 (1973) 22

National Mutual Insurance Co. v. Tidewater
Transfer Co., 337 U.S. 582 (1949) 21

Norwood v. Harrison,
413 U.S. 455 (1973) 37

Olzman v. Lake Hills Swim Club, Inc.,
495 F.2d 1333 (C.A. 2, 1974) 21

Packer Collegiate Institute v. University of
State of N.Y., 273 App. Div. 203, 76
N.Y.S.2d 400 (1948), rev'd on other
grounds, 298 N.Y. 184, 81 N.E.2d 80 30

Page

Pearson v. Duane,
71 U.S. 605 (1866) 17

People v. Turner,
121 Ca. App.2d 861, 263 P.2d 685
(1953), app. dism., 347 U.S. 972 32

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 29, 36

Prince v. Massachusetts,
321 U.S. 158 (1944) 35, 43

Railway Mail Association v. Corsi,
326 U.S. 88 (1945) 18

Red Lion Broadcasting Co. v. FCC,
395 U.S. 367 (1969) 22

Reynolds v. United States,
98 U.S. 145 (1878) 43

Rice v. Commonwealth,
188 Va. 224, 49 S.E.2d 342 (1498) 32

Rich v. Martin Marietta Corp.,
522 F.2d 333 (C.A. 10, 1975) 45

Rodriguez v. East Texas Motor Freight,
505 F.2d 40 (C.A. 5, 1974) 45

Roe v. Wade,
410 U.S. 113 (1973) 40

Rogers v. Loether,
467 F.2d 1110 (C.A. 7, 1972), aff'd on
other grounds, sub nom., Curtis v. Loether,
415 U.S. 189 (1974) 17

Page

Schneider v. Pullen,
198 Md. 64, 81 A.2d 226 (1951) 30

Scott v. Young,
421 F.2d 143 (C.A. 4, 1970), cert. denied,
398 U.S. 929 21

Shapiro v. Dorin,
199 Misc. 643, 99 N.Y.S.2d 830 (1950),
aff'd, 278 App. Div. 705, 103 N.Y.S.2d 757,
aff'd, 302 N.Y. 857, 100 N.E.2d 48, app.
dism., 342 U.S. 884 32

Shelton v. Tucker,
364 U.S. 479 (1960) 39

Sims v. Order of United Commercial Travelers
of America, 343 F. Supp. 112 (D. Mass., 1972) 21

Sosna v. Iowa,
419 U.S. 393 (1974) 46

Stanley v. Georgia,
394 U.S. 557 (1969) 40

State v. Hoyt,
84 N.H. 38, 146 Atl. 170 (1929) 32, 35

State v. Superior Court,
55 Wash.2d 177, 346 P.2d 999 (1959) 32

Sullivan v. Little Hunting Park,
396 U.S. 229 (1969) 13, 23, 24, 25, 41

Tillman v. Wheaton-Haven Recreation Association,
410 U.S. 431 (1973) 13, 14, 15, 23, 24, 25, 26, 41

United States v. Medical Society of South Carolina,
298 F. Supp. 145 (D.S.C., 1969) 22

Page

United States v. O'Brien,
391 U.S. 367 (1968) 41

United States v. Robel,
389 U.S. 258 (1967) 39

Vantine v. City of Tulsa, Okla. Cr.,
518 P.2d 316 (1973) 34

Watkins v. Washington,
472 F.2d 1373 (C.A. D.C., 1972) 45

Constitutional and Statutory Provisions:

First Amendment to the Constitution 18, 38

Fifth Amendment to the Constitution 17

Thirteenth Amendment to the Constitution 8, 11, 13,
14, 23, 38, 40, 41, 42, 43

Fourteenth Amendment to the Constitution 18

28 U.S.C. Sec. 1254(1) 2

42 U.S.C. Sec. 1981 . . . . . 2, 7, 8, 9,
10, 11, 13, 14, 15, 16, 17, 18, 21, 22, 23, 29, 34

42 U.S.C. Sec. 1982 . . . . . 13, 14, 16, 20

42 U.S.C. Sec. 2000e 22, 26, 28, 38

42 U.S.C. Sec. 3601 38

Civil Rights Act of 1866 (14 Stat. 27) . 13, 14, 15, 16, 18, 19, 20, 23

Act of May 31, 1870 (16 Stat. 144) 13

	Page
Civil Rights Act of 1964 (78 Stat. 243, 42 U.S.C. 2000a)	17, 38
Equal Employment Opportunity Act of 1972 (86 Stat. 103)	10, 22, 26, 28
Ala. Code	31
Colo. Rev. Stat.	34
Ga. Code	31
Idaho Code	34
Ill. Stat.	34
Ind. Stat.	34
Ky. Stat.	34
La. Stat.	31
Mass. Laws	34
Minn. Stat.	34
Miss. Code	31
Mont. Code	34
New Jersey Stat.	34
New York Laws	34
N. C. Code	31
Ore. Stat.	34
Penna. Stat.	34

	Page
S. C. Code	31
S. Dak. Laws	34
Utah Code	34
Va. Code	7, 31
V.I. Code	34
Wash. Code	34
Miscellaneous:	
Congressional Globe	19, 20
Congressional Record	22
Emerson, Haber and Dorsen, Political and Civil Rights in the United States (1967)	34
Federal Rules of Civil Procedure, Rule 23 (b) (2)	12, 44
H. Report No. 92-238, 92nd Cong., 1st Sess. (1971)	22, 28
Kinoy, The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones v. Mayer Co., 22 Rutgers L. Rev. 537 (1968)	21
Larson, The New Law of Race Relations, 69 Wis. L. Rev. 470 (1969)	2
Moore's Federal Practice	45
National Conference of Commissioners on Uniform State Laws, Handbook (1966)	33

Page

Note, Fair Educational Practices Acts: A Solution to Discrimination? 64 Harv. L. Rev. 307 (1950) 34

Note, Segregation Academies and State Action, 82 Yale L. J. 1436 (1973) 25, 30

Note, The "New" Thirteenth Amendment: A Preliminary Analysis, 82 Harv. L. Rev. 1294 (1969) . . 21

Notes of Advisory Committee on Federal Rules of Civil Procedure, 39 F.R.D. 69 (1966) 45

S. Report No. 92-415, 92nd Cong., 1st Sess. (1971) . . . 22, 29

U.S. National Advisory Commission on Civil Disorders (Bantam ed. 1968) 42

Wright and Miller, Federal Practice and Procedure 45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-62

RUSSELL L. RUNYON, *et ux.*,
Petitioners,

v.

MICHAEL C. McCRARY, etc., *et al.*,
Respondents.

No. 75-66

FAIRFAX-BREWSTER SCHOOL, INC.,
Petitioner,

v.

COLIN M. GONZALES, etc., *et al.*,
Respondents.

No. 75-278

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,
Petitioner,

v.

MICHAEL C. McCRARY, etc., *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURT CIRCUIT

BRIEF FOR THE RESPONDENTS[1]

OPINIONS BELOW

The opinion of the court of appeals, sitting *en banc*, and its order amending the opinion (A. 4-34, 40-42)[2] are reported

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[1] Respondents in these three consolidated cases, in addition to Michael C. McCrary and Colin M. Gonzales, infants who sued through their respective parents, include their parents, Curtis L. McCrary and Sandra McCrary, and Raymond Gonzales and Margaret R. Gonzales.

By order of the Court, these three cases are consolidated with No. 75-306. All four cases seek review of the same proceeding below.

[2] "A." refers to the single appendix. References preceding a semicolon are to findings of the courts below; those following are to the supporting evidence.

at 515 F.2d 1082. The memorandum opinion and order of the district court which issued July 27, 1973 (A. 133-142) is reported at 363 F. Supp. 1200. A memorandum opinion and order of the district court which issued April 16, 1973 (A. 119-120) is unreported.

JURISDICTION

The judgments of the court of appeals in the consolidated cases below (A. 35-39) were entered on April 15, 1975. Petitions for rehearing were denied by order of the court of appeals filed on May 29, 1975 (A. 40-42). The petitions for writs of certiorari were filed on July 10, July 11, and August 22, 1975, respectively, and were granted on November 11, 1975. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether privately owned educational institutions are prohibited by 42 U.S.C. Sec. 1981 from denying admission to qualified black students on the basis of their race.

2. Whether the injunctive relief granted by the district court against Fairfax-Brewster School is valid and proper.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Thirteenth Amendment

Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall

have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

* * *

42 U.S.C. Sec. 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT

These proceedings arise out of two cases that were consolidated in the district court and in the court of appeals. The plaintiffs in both cases are Negro children and their parents who seek relief for violation of their civil rights guaranteed by the Thirteenth Amendment to the Constitution, as implemented by 42 U.S.C. Sec. 1981. The courts below upheld plaintiffs' contentions that the defendant schools, Fairfax-Brewster School, Inc., and Russell L. Runyon and Katheryne E. Runyon, d/b/a Bobbe's Private School, violated plaintiffs' rights under 42 U.S.C. Sec. 1981 by denying admission to the two children, Colin M. Gonzales and Michael C. McCrary because of their race or color. The relevant facts, as found by the district court and affirmed by the court of appeals, are as follows:

A. Fairfax-Brewster School – its racially discriminatory admission policy

Fairfax-Brewster School is located in Fairfax County, Virginia, where it operates a school program consisting of pre-primary through sixth grade, as well as a summer camp program (A. 7; 59). In the 1972-1973 academic year the school had an enrollment of 223, and in 1972 the camp enrollment was 236 (A. 134; 60). Fairfax-Brewster School does not receive governmental funds or assistance and is supported entirely by tuition paid by the families of students (A. 134). It solicits students by advertising in the Yellow Pages of the telephone directory and by direct mail advertising addressed to "Resident" at specified addresses (A. 7; 74, 176).

In early May 1969, Mr. and Mrs. Gonzales contacted Fairfax-Brewster about enrolling their son, Colin, age 5-½, in the school's summer day camp program and continuing in the first grade in the fall (A. 7; 176-177). The Gonzales' had learned of the school through its advertisement in the Yellow Pages, through an advertisement received in the mail, and from a friend whose son had attended the summer camp. Thereafter, the Gonzales' visited the school with Colin and were shown around (A. 7-8; 177-179). Being pleased with what they saw, the Gonzales' completed the application form for admission, and submitted it along with a required medical certificate prepared by their doctor and a registration fee (A. 8; 180).[3]

[3] The application form as well as the acceptance form used by the school specify in detail the terms of what is designated as the "Enrollment Contract" between the parties (A. 63-66, 70-72).

On May 16, 1969, the medical certificate and fee were returned to the Gonzales' accompanied by a form letter stating that the school was "unable to accommodate the application." No further explanation was given (A. 8; 73). Mr. Gonzales then called the school and spoke to someone identified as Captain Stuart A. Reiss, Chairman of the Board.[4] In response to Mr. Gonzales' inquiry as to why his son's application was rejected, he was told "we are not integrated" (A. 8; 166, 210-211).

Fairfax-Brewster School's policy of excluding Negroes was corroborated by Mrs. Marjorie Bryant, who, in January 1972, telephone the school about enrolling her 4-year-old son, Grady Bryant (A. 10; 221-222). When Mrs. Bryant indicated that her son was black, she was told he could not attend the school because of his race (A. 10; 222-223).

B. Bobbe's Private School – its racially discriminatory admission policy

Bobbe's Private School is located in Arlington County, Virginia, where it operates a school program consisting of pre-primary through second grade, as well as a summer camp program (A. 134; 258). The school's average enrollment is 200 pupils and the average camp enrollment is 100 (A. 134; 108, 112). Bobbe's School does not receive governmental funds or assistance and relies for funding entirely on tuition paid by the families of students (A. 134). The school advertises in the Yellow Pages of the telephone

[4] Captain Reiss' son, Robert S. Reiss is Director of the school, and his daughter-in-law, Olga M. Reiss, is Registrar (A. 8; 239, 246).

directory and also solicits students by direct mail advertising (A. 136; 212, 220-221, 223, 226-227).[5]

In mid-May 1969, subsequent to Colin Gonzales' rejection by Fairfax-Brewster School, Mr. Gonzales, responding to the advertisement of Bobbe's School in the classified directory, telephoned the school (A. 8; 212). Mr. Gonzales stated that he was interested in enrolling his son and in response to his inquiry as to whether the school was integrated was told by the spokesman that only members of the Caucasian race were accepted (A. 8; 212-213).

In August 1972, Mrs. Sandra McCrary, in response to the advertisement of Bobbe's School in the classified directory, telephoned the school about enrolling her 2-year old son, Michael, in the nursery school program (A. 8; 226-227). After first inquiring about the cost, the program, meals, transportation and facilities for "toilet training", she asked if the school was integrated (A. 8; 227). Upon receiving a negative reply, she asked if the school accepted black children. The answer again was "no" (A 8; 227-228).

The policy of Bobbe's Private School of excluding blacks was corroborated by Mrs. Marjorie Bryant, who, in January 1972, after being turned away by Fairfax-Brewster School, called Bobbe's School about enrolling her 4-year-old son, Grady (A. 10; 223). When she indicated that her son was black, Mrs. Bryant was told he could not attend the school because of his race (A. 10; 224).

Similarly, Mr. Marshall Brooks, who works for the Navy Department and is Mrs. McCrary's supervisor, called Bobbe's

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[5] As part of enrolling a child in Bobbe's School completed application and medical forms must be furnished by the parents (A. 143, 148A).

School after he became aware of the pendency of this suit, to find out for himself about the school's policy (A. 10; 263-264). In a telephone converation on May 31, 1973, with the school's superintendent, William C. Gates, Brooks asked whether the school was integrated (A. 10; 264-265). Upon receiving a negative response, Brooks further asked if blacks were admitted. He was told "no" (A. 10; 265).

C. Proceedings below

The district court concluded that Colin Gonzales and Michael McCrary were excluded from the schools and day camp operated by the defendants because they are black, and that the rights of the two children and their parents under 42 U.S.C. Sec. 1981, were thereby violated. The district court enjoined the defendants from continuing to discriminate concerning the admission of students on the basis of race. The court also awarded compensatory damages for the embarrassment, humiliation and mental anguish suffered by the plaintiffs, as well as attorneys' fees. Fairfax-Brewster School was ordered to pay $2,000 damages to Colin Gonzales and $1,000 attorneys' fees. Bobbe's School was ordered to pay $1,000 damages to Michael McCrary, $2,000 to his parents, and $500 to Colin Gonzales, as well as $1,000 attorneys' fees (A. 142). The court denied damages to Mr. and Mrs. Gonzales on the ground that their suit was filed three and one-half years after the discrimination against them occurred and that their claims for damages against the schools were therefore barred by Virginia's two-year statute of limitations. Sec. 8-24, Code of Virginia (1950) (A. 119-120).

The court of appeals, sitting *en banc* and with three judges dissenting, found "ample evidence" in the record to

support the district court's findings that Colin Gonzales and Michael McCrary were excluded from the two schools on grounds of race (A. 10). The court of appeals also agreed with the district court's conclusion that plaintiff's rights under 42 U.S.C. Sec. 1981 were thereby violated. The court of appeals affirmed the district court's award of damages to the individual plaintiffs, as well as the denial of damages to Mr. and Mrs. Gonzales on the ground that their claim was barred by Virginia's two-year statute of limitations (A. 17-18, 41). Finally, the court of appeals, with three judges dissenting, reversed the district court's award of attorneys' fees to plaintiffs. The three judges dissenting on this issue would have affirmed the award of fees to plaintiffs under the "bad faith" exception to the general rule that such fees are not awarded to a prevailing litigant (A. 18-22, 24, 42). The dissenting judges felt that the award of fees was justified by the district court's finding that officials of the defendant schools did not testify truthfully concerning their discriminatory practices.

SUMMARY OF ARGUMENT

I.

A. The language of 42 U.S.C. Sec. 1981, which guarantees all persons "the same right . . . to make and enforce contracts "as is enjoyed by whites, derives from the Civil Rights Act of 1866 and the validity of the section is established by the decisions of this Court. It is clear that the section prohibits discrimination by private parties, and was not intended by Congress only to be a limitation on state action. The decisions of this Court make clear that Sec. 1981 is a valid exercise of congressional power under the Enabling Clause of the Thirteenth Amendment.

Sec. 1981 is to be read literally, and it thus means that when the defendant schools refused to enter into contracts

with the plaintiffs because of their race, plaintiffs were denied "the same right" to make contracts that is available to whites. Sec. 1981's prohibition against racial discrimination in the making of contracts, does not compel unwilling parties to make contracts, but only prohibits a person who makes an offer to contract from making race or color a condition of the offer. "The statutory obligation thus created to treat all persons without distinction is no different than the obligations imposed by civil rights and anti-discrimination laws that have been in existence for many years. Such laws have been upheld repeatedly by the courts against claims that they interfered with constitutional rights of personal liberty and resulted in the taking of property without just compensation.

The term "contracts" as it appears in Sec. 1981 is also to be read in its literal sense, and thus there is no basis for the assertion that it does not encompass contracts such as those entered into between nonpublic schools and parents who enroll their children in such schools. The legislative history of the Reconstruction Acts sheds little light on the kinds of contracts that Congress intended to be covered by Sec. 1981. Accordingly, as indicated by the decisions of this and other courts, the statutory provision should be construed according to present-day conditions. Following this principle, Sec. 1981 has been applied to a variety of contractual relationships that could not have been anticipated by the Reconstruction Congress, and which provide ample precedent for applying it to the school contracts here at issue. Congress recently affirmed this literal construction of the term "contracts" in Sec. 1981, when it rejected efforts, while it was considering the Equal Employment Act of 1972, to make Sec. 1981 inapplicable to contracts of employment.

B. The decisions of this Court teach that a facility that holds itself open to the general public and has no "plan or purpose of exclusiveness" cannot claim exemption from the civil rights laws on the ground that it is "private". Application of this standard to the defendant schools forecloses any claim that they are exempt from Sec. 1981, for the record shows that they publicly advertise for students in the Yellow Pages and through direct mail solicitation. Nor is it of significance that an applicant for admission must meet prescribed qualifications, for a facility is no less open to the public merely because it requires its patrons to to conform to certain standards. It is apparent that the defendant schools are essentially commercial enterprises selling a commodity – education – and hence are no different than other types of enterprises subject to the civil rights laws.

The education of children has long been recognized as a matter involving the public interest, and hence nonpublic schools have been the subject of considerable governmental regulation. This was most recently demonstrated when Congress, as part of the Equal Employment Opportunity Act of 1972, extended Title VII of the 1964 Civil Rights Act to public, as well as nonpublic schools, thereby prohibiting schools of the type involved here, provided they have 15 or more employees, from discriminating in employment on the basis of race, color, religion, sex or national origin. In addition, the decisions of this Court give recognition to the right of states reasonably to regulate nonpublic schools. Among the most common types of state regulation are requirements concerning curriculum, and standards relating to qualifications and certification of teachers. Recent years have also seen the enactment by a substantial number of states of anti-discrimination laws which prohibit nonpublic schools from engaging in discri-

minatory admission practices. There is no reason to believe that these state laws are less valid than the many state and local measures of similar nature that are applicable to other types of enterprises.

There is no merit to claims that application of Sec. 1981 to nonpublic schools interferes with constitutional rights of privacy and freedom of association. Although this Court has held that parents may not be compelled to send their children to public schools, it is equally clear that parents do not have an unfettered right to educate their children as they see fit. Thus, for example, compulsory attendance laws commonly provide that if a child does not attend public school, it must be enrolled in a program where it will receive a specified equivalent education. Similarly, although private bias is not barred by the Constitution, Congress may, in the exercise of its authority under the Thirteenth Amendment, prohibit schools such as those involved here from discriminating on the basis of race. Such congressional action does not violate the constitutional rights of association of persons who patronize such schools, since the freedom of association that has been recognized by this Court is closely linked with the freedoms of speech and assembly that are commonly exercised to promote political or social ideas. Schools are apolitical and the purpose they serve is to provide education, not to advance political or social interests. Likewise, the constitutional right of privacy is not involved here, for that has been recognized only in cases where intimate or familial relationships are involved. Schools that advertise publicly for students are not the type of institution that can claim a constitutional right of privacy. Finally, there is no basis for the assertion that parents who send their children to a segregated school in the belief that this is a desirable form of education are thereby engaged in a pro-

tected form of expression. Assuming, there are parents who consider themselves engaged in expressing a belief when they send their child to a segregated school, that does not entitle their conduct to constitutional protection. It is well settled that where conduct is more action than expression, it is subject to governmental regulation, and this would be particularly true here, in view of the affirmative mandate of the Thirteenth Amendment to eradicate the badges and incidents of slavery.

II.

The injunction granted by the district court against Fairfax-Brewster School is valid and proper. The complaint stated a proper class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of the Negro plaintiffs and other Negroes similarly situated. The injunction issued by the district court not only enjoins Fairfax-Brewster from discriminating against Colin Gonzales on the basis of race, but enjoins the school from discriminating against other persons on racial grounds as well. The validity of the injunction is not impaired by the fact that by the time it was issued the Gonzales' had moved out of the area and Colin was not likely to seek admission to the school in the future, or the fact that he is now beyond the age where he would be eligible to attend the school. As this Court recently held, even where the claim of a named plaintiff has become moot, injunctive relief is still warranted if the controversy between a named defendant and members of the class still exists.

ARGUMENT

I. PRIVATELY OWNED EDUCATIONAL INSTITUTIONS ARE PROHIBITED BY 42 U.S.C. SEC. 1981 FROM DENYING ADMISSION TO QUALIFIED BLACK STUDENTS ON THE BASIS OF THEIR RACE.

A. Section 1981's Proscription Against Racial Discrimination is Applicable to Privately Owned Schools.

The court of appeals was plainly correct in holding that plaintiffs' rights guaranteed by 42 U.S.C. Sec. 1981 were violated as a result of the racially discriminatory admission policies of the defendant schools. That statutory provision, by its terms, guarantees all persons the same right "to make and enforce contracts" as in enjoyed by whites. The "operative language" of Sec. 1981 is traceable to the Civil Rights Act of 1866, 14 Stat. 27, and the section's validity is firmly established by this Court's decision in *Tillman v. Wheaton-Haven Recreation Association,* 410 U.S. 431, 439-440 (1973), and *Johnson v. Railway Express Agency,* 421 U.S. 454, 459-460 (1975). As the Court confirmed in the cited cases, Sec. 1981 in its present form is derived from the Act of May 31, 1870, Secs. 16, 18, 16 Stat. 144, which re-enacted the 1866 Act and specified the manner of its enforcement. Sec. 1981 is a companion of 42 U.S.C. Sec. 1982, both sections having originally been part of Sec. 1 of the Civil Rights Act of 1866. Sec. 1982 was upheld by this Court as a proper exercise of congressional power under the Thirteenth Amendment in *Jones v. Mayer Co.,* 392 U.S. 409 (1968). See also *Sullivan v. Little Hunting Park,* 396 U.S. 229, 235-236 (1969).

In view of the common ancestry of Secs. 1981 and 1982, they obviously warrant a like construction. Thus, Sec. 1981, like Sec. 1982, is not merely a limitation on state action,

but it prohibits discrimination by private parties as well. *Jones, supra,* 392 U.S. at 413. And see *District of Columbia v. Carter,* 409 U.S. 418, 422 (1973). Sec. 1982 proscribes discriminatory barriers to the acquisition of real and personal property.[6] Sec. 1981, on the other hand, is a guarantee that Negroes will not be discriminated against in transactions based on contract. Both sections were enacted pursuant to authority granted to Congress under the Enabling Clause of the Thirteenth Amendment. That clause "clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *Jones, supra,* 392 U.S. at 439, quoting *Civil Rights Cases,* 109 U.S. 3, 20 (1883). The determination of what are the badges and incidents of slavery is a matter within Congress' sphere. In *Jones* the Court held that it was not irrational for Congress to conclude that they encompassed restraints on the acquisition of property. 392 U.S. at 440-441. Other cases make clear that it was equally reasonable for Congress to conclude, as it did, that included among the badges and incidents of slavery was the inability of Negroes to make and enforce contracts. *Tillman, supra,* 410 U.S. at 439-440; *Johnson, supra,* 421 U.S. at 459-460.

Notwithstanding the Court's explicit holding in *Jones v. Mayer Co.*, that Sec. 1 of the Civil Rights Act of 1866 prohibited not just state imposed discrimination but private discrimination as well, defendant Fairfax-Brewster

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[6] Sec. 1982 provides:

> All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold, and convey real and personal property.

argues (Br. 13, 50) that the discrimination practiced by it is not proscribed by Sec. 1981 because the only effect of the 1866 Act was to nullify the Black Codes enacted by former Confederate States following the Civil War. This argument can hardly be taken seriously, for the decisions in *Jones, Tillman* and *Johnson* show it to be totally without merit. In *Jones* the Court noted that the legislative history of the 1866 Act contains numerous "references to private injustices against Negroes – references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without permission of their former masters, white citizens who assaulted Negroes or who combined to drive them out of their communities." 392 U.S. 427-428. In 1866, Congress had before it extensive evidence of private hostility, persecution and discrimination directed at Negroes. Proposals for a narrower enactment aimed only at discriminatory state laws were rejected. Accordingly, this Court concluded in *Jones* that based on the record of the congressional proceedings, "it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein . . ." 392 U.S. at 436.

Another contention upon which Fairfax-Brewster and the intervenor place major reliance was also specifically rejected by the Court in *Jones.* Thus, Fairfax-Brewster argues that by adopting the 1866 Act Congress did not intend to grant Negroes the power to coerce unwilling persons to enter into contracts with them (Br. 13, 49). The intervenor similarly asserts that a contract by definition is a consensual agreement and that Sec. 1981 was improperly construed by the courts below as granting to "plaintiffs the right to compel

the making of an agreement by an unwilling private contractor" (Br. 16-17). However, in *Jones* the Court ruled that the requirements of the 1866 Act must be read literally. Thus, taken together, Sec. 1981 and Sec. 1982 declare that all persons shall have "the same right" as is enjoyed by white citizens to make and enforce contracts, and to purchase and lease property. Referring to Sec. 1982, the Court stated in *Jones* (at 392 U.S. at 421):

> [W]henever property is placed on the market for whites only, whites have a right denied to Negroes [citation omitted]. So long as a Negro citizen who wants to buy or rent a home can be turned away simply because he is not white, he cannot be said to enjoy "the *same* right . . . as is enjoyed by white citizens . . . to . . . purchase [and] lease . . . real and personal property." [Emphasis in original.]

It is obvious that the Court's literal construction of Sec. 1982 is controlling with respect to Sec. 1981, which also speaks of all persons haveing "the same right" as whites. By maintaining their racially discriminatory policies, the defendant schools plainly denied the McCrary and Gonzales families "the same right" to enter into contracts of enrollment for their children that is offered whites.

To say that the defendant schools may not deny blacks the same right of enrollment that is available to whites does not create "compulsory" contracts or run counter to accepted standards of law, as defendants assert.[7] A school that makes a public offer to accept students for enrollment

[7] Fairfax-Brewster's brief 13.

and has its offer accepted can hardly call itself an "unwilling" contractor,[8] since by making the offer it signifies its willingness to enter into a contract. The effect of Sec. 1981 is merely to prohibit the school from making race or color a condition of its offer. The statutory obligation thus created to treat without distinction everyone who accepts the offer is not unlike the common law obligation of innkeepers to provide accommodations for everyone who presents himself as a guest (*Rogers v. Loether,* 467 F.2d 1110, 1117 (C.A. 7, 1972), aff'd on other grounds, *sub nom., Curtis v. Loether,* 415 U.S. 189, 195-196, n. 10 (1974)) and the similar obligation of common carriers to accept all persons who present themselves for carriage. *Pearson v. Duane,* 71 U.S. 605, 615 (1866). Arguments such as those made by defendants were rejected in *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964) where the Court upheld the public accommodation provisions of the Civil Rights Act of 1964 (42 U.S.C. 2000a, 78 Stat. 243) as a valid exercise of congressional power under the Commerce Clause. It was there contended that the statutory requirement that establishments covered by the Act not discriminate in the provision of goods and services deprived those establishments of liberty or property under the Fifth Amendment. The Court, however, after finding that Congress had a rational basis for proscribing racial discrimination and chose a reasonable means for doing so, dismissed the Fifth Amendment contention, declaring that a covered establishment "has no 'right' to select its [patrons] as it sees fit free from governmental regulation" 379 U.S. at 259. As support for its holding, the Court pointed to the fact that 32 states at that time had public accommodations laws, some dating back many years,

[8] Intervenor's brief 16.

and that it had repeatedly upheld such laws in the face of claims that they violated the Due Process Clause of the Fourteenth Amendment, interfered with personal liberty, and resulted in the taking of property without just compensation. 379 U.S. at 260-261, and cases cited. See also *Railway Mail Association v. Corsi*, 326 U.S. 88, 93-94 (1945).[9]

Pointing to the legislative proceedings leading to passage of the Civil Rights Act of 1866, defendants and the intervenor further argue that Congress did not intend the provisions now contained in Sec. 1981 to apply to schools. In part, this contention is based on their claim that the

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[9] Reliance is placed by defendant Runyon (Br. 8) and the intervenor (Br. 16-17) on *Cook v. Advertiser Company*, 323 F. Supp. 1212 (M.D. Ala., 1971), aff'd, 458 F.2d 1119 (C.A. 5, 1972), the former citing the district court's ruling and the latter citing the court of appeals' opinion. However, that case is completely inapposite here. The district court's decision is of no precedential importance, because it takes the view, since overruled by this Court in *Tillman, supra*, and *Johnson, supra*, that Sec. 1981 only reaches state action and does not prohibit private acts of discrimination. See discussion *supra*, pp. 14-15. The court of appeals held in *Cook* that no enforceable contract is involved when a wedding announcement is submitted to a newspaper and rather than print it on the regular society page, the announcement, because it concerns Negroes, is printed on a Negro news page. Both the majority and concurring opinions reflect concern with First Amendment considerations and the fact that if the court held the newspaper's standing offer to receive wedding announcements implied an agreement to publish them, the court would be dictating what the newspaper was to publish. Accordingly, the court held, since whites had no contract right to have announcements published, Negroes were not discriminated against with respect to a right enjoyed by whites. By contrast, in the case at bar the relationship between the defendant schools and pupils accepted for enrollment is unquestionably based on an enforceable contract.

1866 Act was only intended by Congress to abrogate the Black Codes and not to reach private discrimination at all, but as shown *supra*, p. 15, the Court, drawing from the record of the congressional proceedings, held to the contrary in *Jones, supra*. Reliance is also placed by Fairfax-Brewster (Br. 36-37) and the intervenor (Br. 22) on a statement by Congressman Wilson, floor manager of the legislation, in which he stated that the bill provided for the equality of all citizens in the enjoyment of "civil rights and immunities" and went on to explain that by use of that term he did not mean that the bill gave Negroes, the right to vote, to serve on juries or to attend schools with whites. 36 Cong. Globe, 39th Cong., 1st Sess. 1117 (1866). However, this isolated mention of schools found in the congressional debates provides no support for defendants' position here, for it is clear from the context of Congressman Wilson's enumeration of juries, schools and voting rights, that he was referring to matters which at that time were understood to be subject to state control. Indeed, Fairfax-Brewster, at pages 33-34 of its brief, quotes from a speech by Senator Cowan of Pennsylvania in which he expressed concern that the bill not disturb a racially segregated school system that had been established by his state's legislature. 36 Cong. Globe, 39th Cong., 1st Sess. 500 (1866). Aside from the fact that they are obviously outmoded under present consitutional doctrine, these congressional statements were directed at the effect the proposed legislation would have on state laws, and shed no light on what Congress meant to be encompassed by the right "to make and enforce contracts" which was guaranteed by Sec. 1 of the 1866 Act.[10]

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[10] As the Court noted in *Brown v. Board of Education*, 347 U.S. 483, 489-490 (1954), Congress' views concerning the intended

(continued)

A search of the legislative history of the 1866 Act reveals nothing more than that Congress intended what it said – t' ·t the word "contracts" is used in the statute according to its usual meaning. Hence, the term as it appears today in Sec. 1981 must be read literally. This is the rule of construction followed in *Jones v. Mayer, supra,* where the Court held with respect to Sec. 1982 that "Congress meant exactly what it said." 392 U.S. at 422. Certainly, the fact that Congress did not specify the various

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10 (continued)
effect of the Reconstruction Amendments on segregated schools are difficult to ascertain from the congressional debates of the period and "[a]t best they are inconclusive." It is noteworthy, however, that one of the reasons urged for adoption of the Thirteenth Amendment was that it would eradicate the conditions of ignorance and illiteracy in which slaves were kept. Senator Johnson of Maryland, a supporter of the amendment, asked rhetorically on the Senate floor, "Why are these poor creatures kept in a state of absolute ignorance?" 34 Cong. Globe, 38th Cong., 1st Sess. 1424 (1864). He answered his own query by commenting that lack of education was used to keep slaves unaware of the potentiality of a free existence, and that if they were educated they would demand their freedom. *Ibid.* Senator Harlan of Iowa also declared that continuance of slavery "requires the perpetuity of the ignorance of its victims." *Id.* at 1439. Therefore, he noted, in slave states it had been "made a felony to teach slaves to read and write." *Ibid.* Senator Wilson of Massachusetts, a strong supporter of the amendment, argued that upon its adoption, "the school-house will rise to enlighten the darkened intellect of a race imbruted by long years of enforced ignorance." *Id.* at 1324. His expectations were shared by many of his fellow senators. Thus, Senator Clark of New Hampshire, also a supporter, asserted that abolition of slavery would bring a new era of prosperity to the southern states, "and on every hand would grow villages and towns with schools and churches, and all the institutions of a higher civilization." *Id.* at 1369.

kinds of contracts that it intended the statute to cover is not a reason for giving Section 1981 such a meaning so restricted that contracts for private education would be excluded. It has been suggested by more than one commentator that, in light of *Jones v. Mayer Co.*, it is necessary to view the principal of freedom established by the Thirteenth Amendment as one of those "[g]reat concepts . . . purposely left to gather meaning from experience." *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).[11] The relics of slavery survive today in more forms than the Reconstruction Congress could have anticipated, and there is no reason why Sec. 1981 should be limited in application merely because congressional spokesmen at that time did not foresee all the possible forms of contract to which the section might be applicable. Accordingly, decisional law to date reflects a literal reading of the section and its application to a wide variety of contracts. *Johnson v. Railway Express Agency, supra,* 421 U.S. 454 (employment contract); *Scott v. Young,* 421 F.2d 143 (C.A. 4, 1970), cert. denied, 398 U.S. 929 (admission ticket to an amusement park); *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333, 1339 (C.A. 2, 1974) (guest privileges in a swimming club); *Grier v. Specialized Skills, Inc.,* 326 F. Supp. 856 (W.D. N.C., 1971) (admission to a privately owned barber trade school); *Amerson v. Jones Law School,* Civil Action 3343-N (M.D. Ala., Aug. 10, 1972) (admission to a privately owned law school); *Sims v. Order of United*

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11 See generally Note, The "New" Thirteenth Amendment: A Preliminary Analysis, 82 Harv. L. Rev. 1294 (1969); Larson, The New Law of Race Relations, 69 Wis. L. Rev. 470 (1969); Kinoy, The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones v. Mayer Co., 22 Rutgers L. Rev. 537 (1968).

Commercial Travelers of America, 343 F. Supp. 112 (D. Mass., 1972) (purchase of an insurance policy); *United States v. Medical Society of South Carolina,* 298 F. Supp. 145, 152 (D. S.C., 1969) (admission of patients to a privately owned hospital); *Hernandez v. Erlenbusch,* 368 F. Supp. 752 (D. Ore., 1973) (admission to a tavern).

Finally, it is significant that whatever question there might once have been about congressional intent in 1866 when Sec. 1981 was enacted, the issue was resolved recently when Congress ratified the modern judicial construction of the statute. As the Court noted in *Johnson v. Railway Express Agency, supra,* 421 U.S. at 459, when amendments were being considered in 1971 to Title VII, the equal employment opportunity provisions, of the Civil Rights Act of 1964 (42 U.S.C. 2000e, *et seq.,* 78 Stat. 253), Congress specifically recognized the parallel remedies for employment discrimination available under Sec. 1981 as the result of recent judicial interpretations of that section. H. Rep. No. 92-238, 92nd Cong., 1st Sess. 18-19 (1971); S. Rep. No. 92-415, 92nd Cong., 1st Sess. 24 (1971). Later, in considering the Equal Employment Opportunity Act of 1972, the Senate rejected an amendment that would have deprived a claimant of any right to sue under Sec. 1981. 118 Cong. Rec. 3172-3173, 3368-3373 (1972). The congressional approval thus manifested of the construction that has been given to Sec. 1981 confirms judicial interpretations as to the scope and validity of the provision. *N.L.R.B. v. Bell Aerospace Co.,* 416 U.S. 267, 275 (1973); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1969).

B. There Is no Valid Reason to Exempt Privately Owned Schools from Section 1981.

From the discussion above, it is seen that by enacting the Civil Rights Act of 1866, Congress exercised the power granted to it under the Thirteenth Amendment to abolish all badges and incidents of slavery. The defendant schools and intervenor contend, however, that if Sec. 1981 is construed to prohibit racial discrimination by nonpublic schools it will conflict with the constitutional rights of privacy and freedom of association of parents who send their children to such schools. As we show below, these contentions are without substance.

1. The decisions below accord with this Court's Teachings in *Sullivan* and *Tillman.*

The *Sullivan* and *Tillman* cases, *supra,* involved application of the civil rights laws to cooperatively owned community swimming pools which had many of the attributes of conventional private clubs. The courts below in both cases, after considering the manner in which the associations were operated by their members, and the arguments that were raised of privacy and freedom of association, decided that they were private clubs and hence exempt from the civil rights laws. However, this Court reversed, holding that the question of whether the associations were "truly private" depended on whether they had a "plan or purpose of exclusiveness." *Tillman,* 410 U.S. at 438. Such a plan or purpose was not shown, the Court said, since the establishments were "open to every white person . . . there being no selective element other than race." *Ibid.* Nor, the Court held, was a different result required by the fact that the associations had specified maximum numbers of

members or that membership applications were subject to board of directors approval. *Ibid.*

The instant proceeding falls in the same category as *Sullivan* and *Tillman* and, if anything, the facts here made a more compelling case for Sec. 1981 coverage. For the defendant schools make no pretense at having a "plan or purpose of exclusiveness." Indeed, the exact opposite is true because the record shows that they operate just as any commercial business does, openly advertising for customers. The schools both advertise in the Yellow Pages of the telephone directory and they both distribute advertisements through the mail addressed to "Resident." Any child who is qualified by age and background is eligible to attend, provided the school and his class have capacity to receive him, and provided his parents can pay the required tuition. Although the admission requirements of these schools, like those of any school, are used for determining those qualified to attend, they are not unlike the membership eligibility requirements in *Sullivan* and *Tillman*[12] or requirements of age, dress or behavior that are frequently imposed on customers of business establishments.

Applying the precedents of the *Sullivan* and *Tillman* cases to the facts here, we submit the court of appeals was correct in its conclusion that "When a school holds itself open to the public . . . or even to those applicants meeting established

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[12] In addition to not applying at a time when memberships were at the maximum and having one's application approved by the board of directors, in *Sullivan* and *Tillman*, an applicant was required to reside within a prescribed geographic area, satisfy a minimum age requirement, and pay the initiation fee and annual dues.

qualifications, there is no perceived privacy of the sort that has been given constitutional protection" (A. 15).[13]

The dissenting members of the court of appeals gave no weight to the *Sullivan* and *Tillman* decisions, and would have decided this case adversely to the plaintiffs on grounds that do not withstand analysis. Thus, the dissenters suggest that the relationship between a teacher and student is primarily one of status, rather than contract, and is comparable to the relationship of husband and wife (A. 26). However, the dissenters incorrectly identify the relationship that is at issue here. For each of the defendant schools has an enrollment of about 200 pupils and the relevant relationship is the contractual one between the school, as such, and each of the 200 families. Teachers are employed by each school but teachers do not contract with the school's customers; the school does. Even the relationship between teacher and student in a conventional school setting is not intimate in the sense that the dissenters

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[13] The intervenor refers in its brief to the schools that it represents as "flight schools" or "segregation academies" (Br. 34). Although the record does not disclose how they obtain their students, it is a matter of public record that schools of this description have been established in many communities throughout the southern states to provide schooling for whites fleeing from desegrated public schools. Since the purpose of these schools is to provide an alternative to the public schools at various grade levels, it can be presumed that their admissions are open generally to whites in the areas they serve, and that such a school depends for its continued existence on an incoming group of students at the lower grade levels each year. In 1972, there were over a half million students in such schools in southern states. See Note, Segregation Academies and State Action, 82 Yale L.J. 1436, 1441, n. 44 (1973). Schools of this type, with open-ended enrollments, manifestly are not "truly private" under *Sullivan* and *Tillman* decisions.

characterize it, for teachers often deal with classes ranging up to 20 to 30 students. The relevant relationships thus bear no comparison to the status of a husband and wife. Moreover, it would seem unnecessary to point out that the defendant schools are commercial enterprises engaged in selling a commodity – education – while marriage is a noncommercial relationship.

The dissenting court of appeals judges also seem to have been unduly impressed by what they regarded as the "small" size of the defendant schools and the fact that they are not "huge and impersonal" (A. 30). However, the enrollments of about 200 in each of the defendant schools is comparable in size to the 325 members of the Wheaton-Haven Recreation Association, and size was not a factor that was given any weight by the Court in the *Tillman* case. 410 U.S. at 433. Further, the dissenters' emphasis on the asserted intimacy of the contractual relationships involved here overlooks the closeness that may exist in an employment relationship where an employer has only a few employees; yet there is no reason to believe that Sec. 1981 is not applicable to a small employer. *Johnson v. Railway Express Agency, supra,* 421 U.S. at 459-460. It also is significant that employers with as few as 15 employees are now subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended in 1972 (42 U.S.C. Sec. 2000e, 78 Stat. 253, 86 Stat. 103), but there is no basis for doubting the validity of that statute's coverage.

Finally, the dissenting members of the court of appeals seek to distinguish this case from *Jones v. Mayer Co., supra,* 392 U.S. 409, on the ground that there was an element of "necessity" associated with the plaintiff's purchase of property in that case, whereas, in the dissenters' view, "The same basis of necessity is not available to support

the desire of blacks to attend an all white independent school." (A. 32). Aside from the fact that there is not the slightest indication in the language of the 1866 Act or in this Court's decisions construing it that "necessity" has any relevance to application of the statutory provisions, the dissenting opinion reflects a misunderstanding of the circumstances of this case. Thus, the Gonzales and McCrary families are not financially affluent and thus easily able to afford the luxury of sending their children to private schools. Rather, both Mrs. Gonzales and Mrs. McCrary are working mothers, and at the time of the events herein they required private school facilities for their children in order to retain their jobs (A. 190-191, 226B-226C, Tr. 31, 196). At the time the Gonzales' sought admission for Colin in Fairfax-Brewster School, he was not quite 6 years old and thus was not eligible to enter first grade in public school. After trying unsuccessfully to enroll him in public school, the Gonzales' sought Colin's admission to Fairfax-Brewster so that he would be eligible to continue school in the second grade the following year (A. 176, Tr. 74). Similarly, for the McCrary's it was important to have Michael, who was two years old, in some type of day care program, so after he was denied admission to Bobbe's School, his parents made an alternative arrangement with a nursery school which was a considerable distance – 10 miles – from their home, whereas Bobbe's School was less than a mile (A. 229). The only point of mentioning these facts is to correct the misconception reflected in the dissenting opinion to the effect that since public schools are always available, it is an unnecessary luxury for people to send their children to nonpublic schools. As this case shows, for many families privately operated educational facilities are a necessity, and there is no feasible public school alternative.

2. Governmental regulation of nonpublic schools is commonplace

There is nothing in the nature of nonpublic schools, as such, that makes them exempt from governmental regulation. Indeed, experience shows the opposite to be true, for because of the high value placed on education in our society, and the importance of an educated citizenry to the survival of democratic government, nonpublic schools like public schools, have always been a particular subject of legislative concern. Private educational institutions in this country are the alter ego of the public school system, and therefore the quality of the education that they provide and the values that they transmit are no less important from a societal standpoint than those associated with public school education. It is noteworthy that this policy was recently reflected in the action of Congress when it eliminated the exemption for nonpublic and public educational institutions that had been in Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1). In recommending adoption of this change as part of Section 3 of the Equal Employment Opportunity Act of 1972 (P.L. 92-261, 92nd Cong., 2nd Sess.) the House committee reporting out the legislation stated (H. Report No. 92-238, 92nd Cong., 1st Sess. 20 (1971)):

> The committee feels that discrimination in educational institutions is especially critical. The committee can not imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future

> patterns of discrimination. Accordingly, the committee feels that educational institutions, like other employers in the Nation, should report their activities to the Commission and should be subject to the provisions of the Act. [13]

The effect of this amendment is to extend Title VII to all schools with 15 or more employees, and since each of the defendant schools has more than that number,[14] they, as well as other nonpublic schools of at least that size are now prohibited from engaging in discriminatory employment practices on the basis of race, color, religion, sex or national origin. Since there is no reason to question the validity of this extension of Title VII to nonpublic schools, it would be ironical if it resulted in the schools at issue herein being required to hire qualified black personnel for faculty positions, while at the same time they were to prevail in their contention that they were entitled to maintain all-white student bodies.[15]

In *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925), the Court specifically recognized the power of a state government:

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13 Also see S. Report No. 92-415, 92nd Cong., 1st Sess. 11-12 (1971).

14 This is shown by answers to interrogatories filed by Bobbe's School, and because Fairfax-Brewster has the larger enrollment, it presumably has more than 15 employees too.

15 For that matter, Sec. 1981 itself prohibits the schools herein from discriminating on the basis of race in employment matters. *Johnson v. Railway Express Agency, supra*, 421 U.S. at 459-460.

> reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Similarly, in *Meyer v. Nebraska,* 262 U.S. 390, 402 (1923), the Court affirmed the "power of the State to compel attendance at some school and to make reasonable regulations for *all* schools, including a requirement that they shall give instructions in English . . ." (Emphasis added.)

State laws imposing reasonable regulations on privately owned educational institutions take a variety of forms, and they have been recognized as a proper exercise of the police power. See, *e.g., Schneider v. Pullen,* 198 Md. 64, 81 A.2d 226 (1951); *Packer Collegiate Institute v. University of State of N.Y.,* 273 App. Div. 203, 76 N.Y.S. 2d 400 (1948), rev'd on other grounds, 298 N.Y. 184, 81 N.E. 2d 80. In North Carolina, to cite one such law in a jurisdiction where intervenor represents a group of schools,[16] the state board of education is authorized by statute to supervise all nonpublic schools to see that they meet minimum standards set by the state and that children who attend them are taught the same courses as children of corresponding age and grade in the public schools.[17] The North Carolina statute further requires that standards in nonpublic schools concerning promotion of pupils, grade levels and courses of instruction for each grade correspond to those in public schools. Standards relating to qualifications and certification of teachers in public schools are also applied to nonpublic schools. Three other states where intervenor represents schools, Georgia, Mississippi, and South Carolina, are examples of jurisdictions that have adopted comprehensive statutes regulating so-called proprietary schools.[18] These laws, which are usually applicable to trade, technical, industrial and business schools, provide, *inter alia,* for state licensing conditioned on the school's meeting standards governing such matters as financial stability, course offerings, qualifications of personnel, and adequacy of physical facilities. Such schools are required to be bonded and their sales representatives must also be licensed and bonded.

Government concern for the quality of education provided by privately owned schools is best illustrated in jurisdictions with compulsory school attendance laws. All of the states where there are schools represented by intervenor have compulsory attendance laws, except Mississippi.[19] Such laws require all children in the state to attend public or nonpublic school for a specified number of years, typically between the ages of 7 and 16, for the entire length of the

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[16] It is reported that there are 395 schools affiliated with intervenor located in the states of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia. Note, Segregation Academies and State Action, 82 Yale L.J., *supra,* at 1448, n. 70.

[17] N.C. Gen. Stat. Secs. 115-255, 115-256 (1975).

[18] Ga Code Ann. Secs. 32-2301b, *et seq.* (Supp. 1975); Miss. Code Tit. 75, Ch. 60 (Supp. 1975); S.C. Code Secs. 21-750, *et seq.* (Supp. 1974).

[19] Ala. Code tit. 52, Secs. 297, 299 (1958); Ga. Code Ann. Sec. 32-2104 (1969); La. Stat. Ann. Sec. 17:221 (Supp. 1975); N.C. Gen. Stat. Sec. 115-166 (1975); S.C. Code Sec. 21-757 (Supp. 1974); Va. Code Sec. 22-275.1 (Supp. 1975).

school term. Usually, it is provided also that nonpublic schools must prepare reports to be submitted to local school superintendents containing the names, addresses, and parents' or guardians' names for children that are enrolled, and, in addition, daily attendance records must be kept and compiled for periodic reporting to local school officials. In a number of states, Alabama, for example, the law goes further and provides that in order for a child's enrollment in a nonpublic school to satisfy the compulsory attendance law, the school must conform to state standards applicable to public schools governing such matter as curriculum and the qualifications of teachers. South Carolina's compulsory attendance law has a similar requirement. In Virginia the statute requires that any tutor or teacher who teaches a child subject to the compulsory attendance law must meet qualification standards prescribed by the state board of education.

The intent of these laws obviously is to insure that children, whether they go to public or privately owned schools, will obtain an equivalent education.[20] The state, by this means, is exercising its authority as *parens patriae* of immature children to require public and nonpublic schools to conform to the same minimum educational

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20 The equivalency requirement of compulsory attendance laws has been upheld in numerous decisions. See, *e.g., Rice v. Commonwealth,* 188 Va. 224, 49 S.E. 2d 342 (1948); *Meyerkorth v. State,* 173 Neb. 889, 115 N.W. 2d 585 (1962); *Shapiro v. Dorin,* 199 Misc. 643, 99 N.Y.S. 2d 830 (1950), aff'd, 278 App. Div. 705, 103 N.Y.S. 2d 757, aff'd, 302 N.Y. 857, 100 N.E. 2d 48, app. dism., 342 U.S. 884; *People v. Turner,* 121 Cal. App. 2d 861, 263 P.2d 685 (1953), app. dism., 347 U.S. 972; *State v. Hoyt,* 84 N.H. 38, 146 Atl. 170 (1929); *State v. Superior Court,* 55 Wash. 2d 177, 346 P.2d 999 (1959).

standards. The net effect of such laws, as the Nebraska Supreme Court has said, is that both "[p]rivate and parochial schools are a part of the educational system of [the] state." *Meyerkorth v. State, supra,* 115 N.W. 2d at 595. Through such laws, state legislatures have created a unified educational system in which the nonpublic school, as surrogate for the public school system, is required to provide an educational program for children that is substantially equivalent to that provided by the public system.

Recent years have also seen the enactment by a number of states of anti-discrimination laws covering nonpublic schools. These laws provide a precedent for application of Sec. 1981 to such schools as a guarantee against racially discriminatory admission practices.[21] Several of the state laws are based on the Comprehensive Anti-Discrimination Act promulgated by the National Conference of Commissioners on Uniform State Laws (1966 Handbook) which

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21 See Idaho Code Secs. 67-5902(10), 67-5909(6) (1973); Ind. Ann. Stat. Secs. 22-9-1-2(a), 22-9-1-3(1) (Burns 1974); Mass. Ann. Laws ch. 151C, Sec. 1(b)(Supp. 1974); Minn. Stat. Ann. Secs. 363.01 Subd. 20, 363.03 Subd. 5 (Supp. 1974); Mont. Rev. Code Ann. Secs. 64-305(4), 64-306(6) (Supp. 1974); N.J. Stat. Ann. Sec. 10:5-5(1) (Supp. 1975); N.Y. Educ. Law Sec. 313(2), Exec. Law Sec. 296-4 (McKinney Supp. 1974); S. Dak. Comp. Laws Ann. Secs. 20-13-1(11), 20-13-22 (Supp. 1975); V.I. Code Ann. tit. 10, Sec. 2 (1966); Wash. Rev. Code Ann. Secs. 9.91.010, 49.60.040 (1974). Several other states have anti-discrimination statutes limited primarily to vocational and trade schools. See Colo. Rev. Stat. Ann. Secs. 24-34-302(13), 24-34-306(f) (1973); Ill. Ann. Stat. ch. 16 3/4, Secs. 14.40, 18a (Smith-Hurd 1972); Ky. Rev. Stat. Ann. Secs. 163.320(2), 163.340(6) (Supp. 1974); Ore. Rev. Stat. Sec. 345.240 (1974); Pa. Stat. Ann. tit. 24 Sec. 5003(1)(1974); Utah Code Ann. Secs. 34-35-2(11), 34-35-6(f) (Supp. 1973).

makes it unlawful for a public or private educational institution:

> to exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student in the terms, conditions, and privileges of the institution, because of race, color, religion, or national origin.

Although there does not appear to have been a definitive court test of state anti-discrimination legislation as applied to nonpublic schools, a commentary on such laws notes that "it seems far-fetched to argue that the states are powerless to forbid discrimination in education."[22]

3. There is no constitutional reason why Section 1981 is inapplicable to nonpublic schools

The defendants and intervenor argue in substance that application of Section 1981 to nonpublic schools will abridge the rights of freedom of association and privacy of parents who send their children to such schools. The intervenor makes an additional argument to the effect that parents who select an all-white school because of a belief that "segregation is desirable in education" are engaged in a form of expression that is constitutionally protected (Br. 27).

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[22] 2 Emerson, Haber and Dorsen, Political and Civil Rights in the United States 1793 (1967). See generally, Note, Fair Educational Practices Acts: A Solution to Discrimination? 64 Harv. L. Rev. 307 (1950). In *Vantine v. City of Tulsa,* Okla. Cr., 518 P.2d 316 (1973) a preschool was held to be a public accommodation, and hence subject to a municipal anti-discrimination ordinance.

As an initial matter it should be noted that these contentions are erroneous to the extent that they stem from an assumption that parents have an unfettered right to determine how their children are to be educated. The error is clearly demonstrated by the cases referred to *supra,* p. 32, upholding the constitutionality of compulsory school attendance laws. In each of the cited cases a child's parents claimed dissatisfaction with public school education and asserted that they were able to provide what they considered a superior education either at home or through a program of non-certificated private teaching. The courts have uniformly rejected such assertions, and have upheld the right of states to require that in lieu of attending public school a child must be educated under conditions fixed by the state, *i.e.,* where the curriculum, or teacher, or both, have been approved by the state. As the Supreme Court of New Hampshire stated (*State v. Hoyt, supra,* 146 Atl. at 171):

> The defendants' claim that the federal guaranty of liberty enables them to set at defiance any attempt of the state to prescribe the means for ascertaining the sufficiency of educational facilities furnished and to be furnished as a substitute for the public school, goes far beyond anything that has been decided to be the law.

Outside of the educational context this Court also has recognized that government, acting within the range of its powers, may substantially limit parental freedom in matters affecting children. Thus, in *Prince v. Massachusetts,* 321 U.S. 158 (1944), a Jehovah's Witness appealed from a conviction for violating the child labor law by conduct – distributing religious tracts on the streets with her

daughter – which she claimed was an exercise of her religious convictions. The Court acknowledged that the state's enforcement of its law conflicted with the parent's control and religious training of the child, thus threatening vital constitutionally protected interests, but held that against those "sacred private interests, basic in a democracy" stand the interests of society to protect the welfare of children. 321 U.S. at 165. The Court further stated (321 U.S. at 166-167):

> And neither the rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways . . . . It is sufficient to show . . . that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.

Defendants and the intervenor, in support of their position, attempt to read far more into *Pierce v. Society of Sisters, supra,* 268 U.S. 510, than is warranted. The Court there held an Oregon law to be invalid which required all children to attend public schools and which therefore would have had the "inevitable practical result" of destroying all private schools in the state. 268 U.S. at 534. The Court held that the law resulted in an improper taking of the property of private schools, and that it interfered with the right of parents to send their children to such schools if they wished. However, as noted *supra,* pp. 29-30, the Court specifically acknowledged "the power of the state

reasonably to regulate all schools . . ." 268 U.S. at 534. The defendants and intervenor attempt to equate the Court's holding in *Pierce* that parents have a right to send their children to nonpublic schools, with the proposition that the government may not regulate the operation of such schools. Obviously, this is a baseless suggestion. Government's role as a regulator is a familiar one and is always subject to the limitation of reasonableness. But to regulate private schools is manifestly not the same as prohibiting children from attending them or destroying them entirely, as the Oregon law would have done. The Court recently had occasion to observe that "*Pierce* is not without limits . . . [it] held simply that while a State may posit [educational] standards, it may not pre-empt the educational process by requiring children to attend public schools." *Norwood v. Harrison,* 413 U.S. 455, 461 (1973).

The defendants and intervenor also rely heavily on language in *Norwood v. Harrison, supra,* 413 U.S. at 469, and *Green v. Connally,* 330 F. Supp. 1150, 1166 (D.D.C., 1971), aff'd *sub nom., Coit v. Green,* 404 U.S. 997, to support their contentions. That reliance is misplaced, however, for neither case constitutes a ruling on the issue presented here. *Norwood,* in fact, is support for plaintiffs' position more than any other. Thus, although the Court there notes that "private bias is not barred by the Constitution" and that some persons may prefer racially segregated schools for their children, the Court further observes that the Constitution "places no value on discrimination" as it does other specified rights. 413 U.S. at 469-470. Continuing in terms that foreshadow plaintiffs' position in the case at bar, the Court states (*id.* at 470):

> Invidious private discrimination may be characterized as a form of exercising freedom of

association protected by the First Amendment, but it has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under §2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts[10]

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10 See, *e.g. Griffin v. Breckenridge,* 403 U.S. 88 (1971); *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968); 42 U.S.C. §2000a *et seq.* (barring discrimination in public accommodations); 42 U.S.C. §2000e, *et seq.* (barring discrimination in private employment); 42 U.S.C. §3601 *et seq.* (barring discrimination in private housing transactions).

The opinion of the three-judge district court in *Green v. Connally, supra,* similarly is more supportive of plaintiffs' position here than of defendants'. The court there held that it was unconstitutional for the Internal Revenue Service to grant tax exemption to private racially segregated schools and to allow taxpayers to take deductions for gifts to such institutions. Further, the court specifically rejected the schools' contention that they had a constitutionally protected right to discriminate and that it was therefore impermissible for the Government to condition receipt of tax benefits on their adherence to nondiscriminatory policies. While acknowledging the general right of association exercised by those who send their children to segregated private schools, the Court held that to the extent that there was a conflict, that associational right had to give way to the "compelling as well as . . . reasonable government interest in the interdiction of racial discrimination which stands on highest constitutional

ground, taking into account the provisions and penumbra of the Amendments passed in the wake of the Civil War." 330 F. Supp. at 1167.

Gilmore v. City of Montgomery, 417 U.S. 556 (1974), which defendants and intervenors cite, likewise provides no support for their contentions. The Court there held that it was improper under the Fourteenth Amendment for the city to provide aid to discriminating private schools by allowing them exclusive use of municipal recreational facilities. There is dictum in the Court's opinion referring to the "associational rights which our system honors" which permit individuals to join "clubs" with exclusionary policies, but the Court's remarks do not refer to schools. 417 U.S. at 575. Further, the Court, citing *Norwood v. Harrison, supra,* repeats its view that the right to discriminate "is not subject to affirmative constitutional protection." *Ibid.*

The clear lesson to be drawn from this Court's decisions is that although parents have a constitutionally protected right to send their children to nonpublic schools, that right is unrelated to the recognized right that every citizen has to engage in associational activity without government interference. The constitutionally protected right of association evolved from a need to protect individuals who joined with others for the expression or promotion of political or social ideas.[23] Since the right of association is closely linked to the freedom of speech and assembly, governmental interference with associational freedom bears a heavy burden of justification. However, freedom of

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23 See *NAACP v. Alabama,* 357 U.S. 449, 460-466 (1958); *United States v. Robel,* 389 U.S. 258, 263-268 (1967); *Shelton v. Tucker,* 364 U.S. 479, 485-487 (1960); *Healy v. James,* 408 U.S. 169, 181 (1972).

association, as it has been recognized in the decided cases, is not an exclusionary concept and, indeed, the exclusion of individuals is normally antithetical to the strength that is gained from numbers when associations are formed to promote political or social ideas. Moreover, freedom of association has no relevance to a school which has as its purpose the education of children, for schools, as such, are normally apolitical. Although the Constitution is a barrier against governmental interference with an individual's right of free speech and concomitant political activity, as shown above, the regulation of schools by the government is permissible. Moreover, the justification for such regulation in the circumstances presented by this case is particularly compelling since its purpose is to effectuate the constitutional mandate embodied in the Thirteenth Amendment.

The right of privacy as it is recognized by the decisions of this Court likewise provides no justification for the discriminatory policies of the schools involved here. The cases have established the right to freedom from government intrusion in specific situations involving the family, procreation and the home.[24] The court of appeals pointed out below that, "The right is appropriately recognized in certain instances when only a few people are involved in activity unintended for the public view." 515 F.2d at 1088. Accordingly, as the court held, "Though certain intimate and private affairs of men and women are protected from governmental interference, the schoolhouse is far from the realm of protection." *Ibid.* There is no

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[24] See *Roe v. Wade*, 410 U.S. 113, 152-154 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 452-455 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564-568 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

question but that the record of this case supports the court's conclusion. Further, as shown *supra*, the schools involved herein lack the characteristic of exclusiveness that would make them "truly private" under this Court's decisions in *Sullivan* and *Tillman, supra*.

The intervenor asserts (Br. 25-27) that parents who believe that "segregation is desirable in education" have a constitutionally protected right to express that belief by sending their child to an all-white school. This argument is highly theoretical, since there is no evidence of record that any parents are in fact engaged in expressing such a belief; and the defendant schools do not even make the argument. Assuming *arguendo*, however, that it is an expressive act to send a child to a segregated school because of a belief that this is a desirable form of education, that does not necessarily entitle the act to constitutional protection. For such conduct is more action than expression, and hence it is more susceptible to governmental restriction than pure speech. *United States v. O'Brien*, 391 U.S. 367, 376 (1968); *Eisenstadt v. Baird, supra*, 405 U.S. at 458 (Douglas, J., concurring). The asserted right to send a child to a segregated school, therefore, stands on no stronger a footing than rights that individuals have heretofore claimed to live in a segregated neighborhood eat in a segregated restaurant, stay at a segregated hotel, or attend a segregated theater. As shown *supra*, there is no longer any question but that such rights must yield to the national policy expressed in the Thirteenth Amendment that requires eradication of the badges and incidents of slavery.[25]

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[25] A motion has been filed with the Court by Dade Christain Schools requesting leave to file a brief herein as *amicus curiae* in support of the defendants, but as of the time the instant brief is

(continued)

Finally, apart from the force of the Thirteenth Amendment itself, the public interest justifying application Section 1981 to privately owned schools and thereby extending to that sector of our educational system the same prohibition against racial discrimination that exists in the public sector was aptly stated in the recommendations of the U.S. National Advisory Commission on Civil Disorders (p. 438, Bantam ed. 1968):

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25 (continued)
written the *amicus* brief has not been filed, in apparent violation of the Court's Rule 42. In any event, Dade asserts in its motion that its interest in the case is unique because, unlike the other schools in the proceeding, its policy of excluding black students "is founded upon religious beliefs"(Motion 5). Dade refers further to a proceeding brought against under Sec. 1981 in the United States District Court, Southern District of Florida, in which it was enjoined from refusing admission to children on racial grounds. *Brown v. Dade Christian Schools, Inc.*, No. 73-1313-Civ.-JE), appeal pending in the United States Court of Appeals for the Fifth Circuit (No. 75-3260). In that district court proceeding, in a decision rendered May 27, 1975 (unreported) Judge Joe Eaton held that although Dade had a discriminatory "philosophy and policy" it was not a "fundamental religous tenet," and therefore the Free Exercise Clause was not involved. The issue, therefore, is not presented in this proceeding of whether a religious basis for a school's discriminatory practices could ever validly be asserted as a shield against the thrust of the Thirteenth Amendment. However, so that their position on the issue is clear plaintiffs point out, first, that the decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which would have a bearing on the issue, set a standard that would be difficult to meet. The Court there granted children of the Amish sect over age 14 an exemption from Wisconsin's compulsory school attendance laws on the ground that attendance to age 16 as the law provided was contrary to the beliefs of the Amish religion. The Court held that this limited exemption for the sect was warranted on the basis of the "almost 300 years of consistent practice and strong
(continued)

> [W]e believe school integration to be vital to the well-being of this country.
>
> We support integration as the priority education strategy because it is essential to the future of American society. We have seen in this last summer's disorders the consequences of racial isolation, at all levels, and of attitudes toward race, on both sides, produced by three centuries of myth, ignorance and bias. It is indispensable that opportunities for interaction between the races be expanded. The problems of this society will not be solved unless and until our children are brought into a common encounter and encouraged to forge a new and viable design of life.

II. THE INJUNCTIVE RELIEF GRANTED BY THE DISTRICT COURT AGAINST FAIRFAX-BREWSTER SCHOOL IS VALID AND PROPER

Fairfax-Brewster (Br. 69-70) challenges the propriety of the injunctive issued against it by the district court, but as

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25 (continued)
evidence of a sustained faith pervading and regulating [the members'] entire mode of life" 406 U.S. at 219. It is doubtful if comparable justification could be shown for relief from an anti-discrimination law by any group espousing racial segregation as a religious tenet. In any event, even if a religious basis for such views could be shown, it is submitted that they would be of necessity have to yield to the strong public policy against the practice of racial discrimination embodied in the Thirteenth Amendment. *Prince v. Massachusetts, supra*, 321 U.S. at 166; *Reynolds v. United States*, 98 U.S. 145, 166-167 (1878); *Davis v. Beason*, 133 U.S. 333, 344 (1890).

we show below, its argument is without merit.[26]

The complaint filed by the Gonzales' against Fairfax-Brewster alleged that the school had discriminated against plaintiffs because they are Negroes, and that the plaintiffs were bringing the action on their own behalf and on behalf of all similarly situated Negroes, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure (A. 48). Other allegations were included in paragraph 3 of the complaint setting forth the prerequisites for a Rule 23 class action (*ibid.*). The prayer for relief sought a declaration of illegality as to Fairfax-Brewster's discriminatory admission policy and requested an order enjoining the school from continuing to discriminate on the basis of race with respect to the admission of children to its programs (A. 50-51). Although the injunctive order issued by the district court grants the class action relief requested by plaintiffs, there is an inconsistency between the order and the court's opinion in which it specifically declined to hold that the case could be maintained as a class action (A. 138). Even though the district court would appear to have been mistaken in refusing to find this to be a class action, it was harmless error, since the injunctive order is a proper remedy in the circumstances.

As shown *supra*, Fairfax-Brewster's refusal to accept Colin Gonzales for admission was obviously not for any reason that related to him individually, but was because of his race – a class characteristic. It has been noted that "Racial discrimination is by definition class discrimination . . ." *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (C.A. 5, 1968); *Bowe v. Colgate-Palmolive Co.*, 416

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[26] The matter was not discussed in the opinion of the court of appeals where the issue was also raised.

F.2d 711, 719 (C.A. 7, 1969). Rule 23(b)(2) was specifically designed to provide full and effective relief in an action such as this, which seeks redress not just for an individual discriminatee but is intended to eliminate an unlawful policy of general applicability. See Notes of Advisory Committee on Rules of Civil Procedure, 39 F.R.D. 69, 102 (1966); Wright and Miller, Federal Practice and Procedure Secs. 1771, 1776; 3B Moore's Federal Practice Par. 23.40; *Barnett v. W.T. Grant Company*, 518 F.2d 543, 547-548 (C.A. 4, 1975); *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40, 50 (C.A. 5, 1974); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 340 (C.A. 10, 1975). On the basis of the district court's finding that Colin Gonzales was discriminatorily denied admission to Fairfax-Brewster School because of his race, the court properly framed its order to enjoin the school not only from discriminating against him but from continuing to discriminate against others as well. "Where pervasive racial discrimination is demonstrated, the court has not only the power, but also the duty, to render a decree eliminating the effects of past discrimination and ensuring equal opportunity in the future." *Watkins v. Washington*, 472 F.2d 1373, 1376 (C.A.D.C., 1972).

The validity of the district court's injunctive order is not impaired by the fact that Fairfax-Brewster's program only goes through the sixth grade and Colin is now beyond the age where he would be eligible to attend the school. The evidence shows that after his rejection by the school, Colin's parents made alternative arrangements for him. For two years, he attended Congressional School, a privately owned school, and the following two years he attended a parochial school. Shortly, before issuance of the district court's injunction, the Gonzales' moved to another county, where they planned to enroll Colin in

public school (A. 182-184). Fairfax-Brewster's objection to the district court's injunction, therefore, raises the question whether the dispute underlying the injunction was moot either at the time the order issued or is now moot.[27] It is clear, however, that at the time the injunction was issued by the district court the underlying dispute was not moot, since Colin still had two more years in which he was eligible to attend Fairfax-Brewster and there was always the possibility of his family's returning to the area and again seeking his admission to the school. In addition, when the injunction was issued and at all time since, the Gonzales' have represented the class of other Negroes who might seek admission to Fairfax-Brewster. It cannot be contended that the dispute is moot as to the class. As the Court recently held, even where the claim of a named plaintiff has become moot, injunctive relief is still warranted if the controversy between a named defendant and members of the class still exists. *Sosna v. Iowa,* 419 U.S. 393, 398-403 (1974), and cases cited at n. 10.

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[27] It should be noted that the dispute between the parties concerning the district court's award of damages to Colin is still alive in any event. Because of his status as a minor, Colin's claim for damages was not barred by the statute of limitations, as the district court held was the case with his parents, *supra*, p. 7.

CONCLUSION

For the foregoing reasons, plaintiffs submit that the conclusions of the court of appeals with respect to the issues presented herein should be affirmed.

Respectfully submitted,

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Nos. 75-62, 75-66, 75-278 and 75-306

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

RUSSELL L. RUNYON, *et ux.*, *Petitioners*,

v.

MICHAEL C. McCRARY, etc., *et al.*, *Respondents*.

FAIRFAX-BREWSTER SCHOOL, INC., *Petitioner*,

v.

COLIN M. GONZALES, etc., *et al.*, *Respondents*.

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION, *Petitioner*,

v.

MICHAEL C. McCRARY, etc., *et al.*, *Respondents*.

MICHAEL C. McCRARY, etc., *et al.*, and
COLIN M. GONZALES, etc., *et al.*, Petitioners,

v.

RUSSELL L. RUNYON, KATHERYNE E. RUNYON,
d/b/a BOBBE'S PRIVATE SCHOOL, and
FAIRFAX-BREWSTER SCHOOL, INC., *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF OF PLAINTIFFS BELOW IN NOS. 75-62, 75-66 and 75-278, AND REPLY BRIEF IN NO. 75-306

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CITATIONS

Cases:	Page
Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)	9, 10, 11
Doe v. Poelker, 515 F.2d 541 (C.A. 8, 1975)	11
Fireman's Fund Insurance Co. v. Santoro, 376 F.2d 157 (C.A. 1, 1967)	9
Hall v. Cole, 412 U.S. 1 (1973)	7, 8
Jenks v. Mays, 464 F.2d 1223 (C.A. 5, 1972)	11
Johnson v. Railway Express Agency, 421 U.S. 454 (1975)	12
Jones v. Mayer Co., 392 U.S. 409 (1968)	5
L.F. Strassheim Co. v. Gold Metal Folding Furniture Co., 477 F.2d 818 (C.A. 7, 1973)	9
Monroe v. Board of Commissioners of City of Jackson, 453 F.2d 259 (C.A. 6, 1972)	11
Newman v. Piggie Park Enterprises, 390 U.S. 400	8
Newman v. State of Alabama, 522 F.2d 71 (C.A. 5, 1975)	11
Rolax v. Atlantic Coast Line R. Co., 186 F.2d 473 (C.A. 4, 1951)	11

Page

Skil Corporation v. Lucerne Products, Inc.,
503 F.2d 745 (C.A. 7, 1974), cert. denied,
420 U.S. 974 8

Thonen v. Jenkins,
517 F.2d 3 (C.A. 4, 1975) 8

Universal Oil Products v. Root Refining Co.,
328 U.S. 575 (1946) 9

Wade v. Mississippi Cooperative Extension Service,
___ F.2d ___ (C.A. 5, Feb. 24, 1976) 11

Wright v. Jackson,
522 F.2d 955 (C.A. 4, 1975) 11

Statutory Provisions:

28 U.S.C. Sec. 1923 . . . . . 9, 10

42 U.S.C. Sec. 1981 . . . . . 1, 2, 12

42 U.S.C. Sec. 1988 . . . . . 10, 11

14 Stat. 27 3

Sec. 14.1-177 Code of Virginia (1950) 10

Miscellaneous:

Bickel, The Original Understanding of the
Segregation Decision, 69 Harv. L. Rev. 1 (1955) 3

Congressional Globe 2, 4, 5, 6

Frank and Munro, The Original Understanding of
"Equal Protection of the Laws," 50 Col. L. Rev.
131 (1950) 3

Kelly, The Fourteenth Amendment Reconsidered,
54 Mich. L. Rev. 1049 (1956) 3, 4, 5

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I

As an initial matter, plaintiffs wish to respond to what seems to be a new line of argument by defendant Fairfax-Brewster School in its reply brief concerning the applicability of 42 U.S.C. Sec. 1981 to nonpublic schools. The

school advances certain contentions that were not clearly stated in its opening brief but which allegedly support its position that the legislative history of the Civil Rights Act of 1866 discloses a congressional intent not to apply the provisions of the statute to schools such as those at issue here. As we show below, these contentions are wholly lacking in merit.

It is true, as Fairfax-Brewster points out, that there were differences between the Civil Rights Act of 1866 as it was originally introduced and as it was finally enacted by Congress. Those differences, however, are not relevant to the question of whether the statute applies to the defendant schools. The principal changes in the legislation resulting from the congressional debates were in Section 1 which contained the language embodied in 42 U.S.C Sec. 1981.[1] One of the changes was the elimination of the

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[1] As introduced, Section 1 read as follows (36 Cong. Globe, 39th Cong., 1st Sess. 129, 211-212 (1866)):

> That there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

(continued)

language contained in the first sentence of the original bill which provided that there would be "no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color or previous condition of slavery . . . ." The explanation for this change is summarized in an informative article by Alfred H. Kelly, the constitutional historian who is cited in Fairfax-Brewster's reply brief.[2] Thus, following the introduction in Congress of the bill that was to become the 1866 Act, sharp controversy developed over the scope and meaning of the guarantee of civil rights in the

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[1] (Continued)

Section 1, as enacted, provided as follows (14 Stat. 27):

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

[2] Kelly, The Fourteenth Amendment Reconsidered, 54 Mich. L. Rev. 1049 (1956). With respect to matters relevant herein, Kelly's account of the legislative history of the 1866 Act accords substantially with the work of others who have studied the proceedings of the Reconstruction Congress. See Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 11-29 (1955); Frank and Munro, The Original Understanding of "Equal Protection of the Laws", 50 Col. L.Rev. 131, 139-142 (1950).

first section. Conservatives opposing the bill argued that it would invalidate state laws forbidding racial inter-marriage and providing for segregated schools, transportation facilities and theatres. To reach this conclusion, they seized on a broad and expansive interpretation of the term "civil rights" in the first sentence.[3] Some of the bill's defenders took the bold course of admitting the sweeping effect ascribed to the bill, while others resorted to vague assurances that "civil rights" had a narrower meaning than the conservatives claimed and that the bill would not upset state discrimination laws.[4] The Senate passed the bill on February 2, 1866, with the "no discrimination in civil rights" clause intact.[5] The House took up the bill on March 2 and Congressman James Wilson of Iowa, Chairman of the House Judiciary Committee, defended the measure by giving a narrow construction to the phrase in question. It was in this context that he made the statement, relied on in the opening briefs of the defendant schools to the effect that the bill's guarantee of "civil rights and immunities" would not give Negroes the right to vote, to serve on juries or to attend integrated schools – all matters which were affected at the time by various state discrimination laws.[6] The conservatives were unpersuaded, however, so an amendment was offered to strike out the "no discrimination in civil rights" clause from the bill and thereby eliminate apprehension that the bill would invalidate state segregation laws.[7] The sponsor of the

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[3] Kelly, *supra*, at 1063-1064.

[4] *Id.* at 1065.

[5] 36 Cong. Globe, 39th Cong., 1st Sess. 606-607 (1866).

[6] *Id.* at 1117.

[7] *Id.* at 1271-1272, 1291-1293.

amendment was Congressman John Bingham of Ohio, a member of the Joint Committee on Reconstruction, which was then engaged in drafting what was to become the Fourteenth Amendment. Bingham's view and that of the majority of Congress, was that state discrimination laws should more appropriately be dealt with by constitutional amendment than by a statute adopted under the Thirteenth Amendment.[8] Accordingly, the bill that passed both Houses of Congress and was finally enacted over President Johnson's veto omitted the "no discrimination in civil rights" clause.[9]

It is perfectly plain, therefore, from the legislative history of the 1866 Act that by eliminating the "no discrimination in civil rights" clause, Congress merely wished to make clear that it did not intend this enactment to invalidate state discrimination laws, including laws existing in a number of states that provided for racially segregated schools. The role of bringing state laws into line with Federal constitutional standards was assigned to the Fourteenth Amendment. The 1866 Act, in contrast, represents legislative implementation of the Thirteenth Amendment through the proscription of specified conduct which Congress determined to be among the "badges and incidents of slavery." *Jones v. Mayer Co.*, 392 U.S. 409, 439-441 (1968). Clearly, the fact that Congress did not intend the 1866 Act to be a vehicle for invalidating state laws requiring segregation of schools and other facilities does not avail defendants here, for this proceeding obviously does not involve state-imposed discrimination. Rather, it involves discrimination by private parties of a type which, as shown

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[8] Kelly, *supra*, p. 1067-1069.

[9] Cong. Globe, *supra*, at 1366-1367, 1413-1416, 1809, 1860.

in plaintiffs' opening brief, falls within the ambit of 42 U.S.C. Sec. 1981.

It is likewise difficult to see any relevance to the further point made by Fairfax-Brewster in its reply brief (pp. 7-8) concerning the addition by the House to Section 1 of the 1866 Act of the phrase "as is enjoyed by white persons." Although not in the bill as it originally passed the Senate, the addition of the phrase is correctly explained by Fairfax-Brewster in its reply brief (p. 7) where it notes Congressman Wilson's statement that the limited purpose of the amendment was to preclude a construction of the statute that would remove the existing legal disabilities of minors and females.[10] Surely, Fairfax-Brewster cannot be suggesting that the addition of this phrase to the bill is significant here merely because Michael McCrary and Colin Gonzales are minors. For it hardly seems necessary to note that the contracts at issue here are not between the schools and minors who are enrolled as pupils, but rather, the contracting parties are the parents who pay the enrollment fees and tuition.

II

In responding to plaintiffs' argument that attorneys' fees should be awarded here under the bad faith principle because of the oppressive effect of racial discrimination on its victim, Fairfax-Brewster (Br. 15-16) takes the remarkable position that the racial discrimination experienced by the Gonzales had no oppressive effect. As we show, this assertion is directly contradicted by the facts of record. Thus,

[10] Cong. Globe, 39th Cong., 1st Sess., App. 156-157 (1866). See also the colloquy between Senators Van Winkle and Trumbull quoted in Fairfax-Brewster's reply brief (pp. 7-8). Cong. Globe, *supra*, at 1413.

the evidence shows that after Mr. Gonzales learned that Colin could not attend Fairfax-Brewster because of his race, he was upset and angry, and in his frustration called the U.S. Department of Health, Education and Welfare to find out if anything could be done about Colin's rejection (A. 181-182, 211). This proved futile, of course, since the school receives no government funds. Mrs. Gonzales testified that her husband was "very angry" and that she also was upset by Colin's rejection (A. 181-182). The Gonzales' had taken Colin to visit Fairfax-Brewster and he had been "impressed" and "excited" by what he saw (A. 179). He was also excited about attending the school's summer camp (A. 185). After Colin was rejected, however, his parents told him that he could not attend Fairfax-Brewster because "they do not accept black children there" (A. 213). He was "disappointed" and "upset" (A. 186, 213-214). Mrs. Gonzales testified, "[I]t was the first experience we were having in this situation. So, you know, it took some explaining to him. . ." (A. 186). Responding to Colin's question as to why other children could attend the school and he could not, his father told him, "Well, see we're different than they are, as a result, these are the rules . . . you can't attend" (A. 213). Following Colin's rejection, Mrs. Gonzales testified, he "was quite conscious then that – I mean . . . realized that there was a difference as regards how others felt about him" (A. 193-194).

Fairfax-Brewster also suggests (Br. 11) that an award of attorneys' fees based on the bad faith principle could not be supported in this case because the district court declined to award punitive damages to the plaintiffs below. As this Court has explicitly recognized in *Hall v. Cole*, 412 U.S. 1 (1973), however, there is no necessary relationship between an award of attorneys' fees on the basis of bad faith and a failure to award punitive damages to a prevailing party. Thus as the Court said (412 U.S. at 15):

> Petitioners also contend that the award of attorneys' fees in this case was improper because the District Court, in denying respondent's claim for punitive damages, found that 'the defendants, in good faith, believed that they had a right to charge and discipline [respondent] for his actions.' It is clear, however, that 'bad faith' may be found, not only in actions that led to the lawsuit, but also in the conduct of the litigation. And, as the Court of Appeals noted, the conduct of this particular litigation was marked by 'the dilatory action of the union and its officers . . . '

This Court's recognition of vexatious litigation tactics as an independent basis for a determination of bad faith and the award of attorneys' fees in *Hall v. Cole* accords with its prior decision and has been followed by many lower courts. See, *e.g.*, plaintiffs' opening brief at 15-16 and *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, n. 4. Courts have frequently cited litigation tactics similar to those engaged in by the defendants in this case as grounds for an award of attorneys' fees under the bad faith rationale. For example, in *Skil Corporation v. Lucerne Products, Inc.*, 503 F.2d 745, 750 (C.A. 7, 1974), *cert. denied*, 420 U.S. 974, the Seventh Circuit found fees properly awardable in large measure because the district court had found the defendant's testimony "disingenuous," and given with "deceptive intent." Likewise, in *Thonen v. Jenkins*, 517 F.2d 3, 6-7 (C.A. 4, 1975), the award of fees was premised upon the defendants' litigation conduct which included the appeal of a consent order they had suggested and their insistence upon an incorrect procedural position which required an unnecessary trip to the chambers of the judge. Similarly, in *Newman v. Piggie Park Enterprises*, this Court noted that reliance upon groundless contentions for the purpose of

delay has long been recognized as a basis for the award of fees. 390 U.S. at 402, n. 4, 5. The willingness of courts to award fees based on bad faith in litigation has its origin in the twin concerns that the integrity of judicial process should not be "defiled" and that litigants should not be subjected to unnecessarily extended litigation or undue expense. *Universal Oil Products v. Root Refining Co.*, 328 U.S. 575, 580 (1946).[11] See also *L.F. Strassheim Co. v. Gold Metal Folding Furniture Co.*, 477 F.2d 818, 823-824 (C.A. 7, 1973); *Fireman's Fund Insurance Co. v. Santoro*, 376 F.2d 157, 160 (C.A. 1, 1967).

Certainly, defendants' denial under oath of a policy of denying the admission to their school of black children generally, and these plaintiffs in particular, – a denial which was expressly rejected by the district court as not credible – is no less an abuse of the judicial process than the conduct condemned by the courts in the foregoing cases. While defendants are, of course, entitled to a judicial determination of their right to exclude black children, this right affords no license to needlessly protract litigation by attempting to conceal their discriminatory conduct. By resorting to this tactic, defendants compelled plaintiffs to unduly extend their pre-trial discovery and to engage in a lengthy trial on the question of whether black pupils had been excluded. Moreover, by persisting in this discredited defense on appeal, defendants placed an unwarranted burden on both plaintiffs and the court of appeals.

Citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), defendant Fairfax-Brewster

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[11] Although it is of no relevance to the issue before the Court, plaintiffs wish to correct their statement of the holding in *Universal Oil Products* noted in their opening brief at p. 15. In fact, the Court in that case reversed the decision of the court of appeals on grounds unrelated to the issue of bad faith.

suggests (Br. 7) that 28 U.S.C. Sec. 1923 is inconsistent with the discretionary allowance of attorneys' fees under the authorization of 42 U.S.C. Sec. 1988. Plaintiffs submit, however, that the legislative history of Sec. 1988 and the purposes of the original Congressional limitation of fees now found in 28 U.S.C. Sec. 1923 are wholly supportive of such an award of fees in civil rights cases brought under the Civil Rights Act. See plaintiffs' opening brief at pp. 19-22. As this Court noted in *Alyeska*, 421 U.S. at 251, a principal purpose of the congressional limitation of court-awarded fees in Sec. 1923 was to standardize the award of fees and control the great diversity of practices which had been adopted under state laws then applicable to federal cases. This objective is in no way compromised by authorizing federal courts to resort to federal laws which modify this fee schedule. Therefore, petitioners submit that the authorization of Sec. 1988 should be viewed as a specific and limited modification to the attorneys' fees limits of Sec. 1923. Such a view is entirely consistent, if not required, by the indisputable intent of Congress, as evidenced by the plain statutory language of Sec. 1988, to make available to the courts adjudicating claims under provisions of the Civil Rights Act of 1866 the broadest possible range of remedial relief.[12]

As a final matter, it should be noted that the award of attorneys' fees by the district court in this case preceded this Court's decision in *Alyeska*. In addition, neither the applicability of the bad faith exception nor of Sec. 1988

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[12] While, as plaintiffs have discussed in their opening brief (at p. 20), Sec. 1988 authorizes an initial resort to other federal laws to locate suitable remedies in suits brought under the 1866 Civil Rights Act, it is significant that Virginia law places no ceiling on the equitable award of attorneys' fees. See Sec. 14.1-177, Code of Virginia (1950).

with respect to the award of attorneys' fees was raised before the district court or addressed in briefs submitted to the court of appeals. The basis for the district court's award of attorneys' fees in this case was not explained in its opinion. In light of these facts, it should be pointed out that several other cases involving the issue of attorneys' fees which were pending at the time of this Court's decision in *Alyeska* have been remanded by courts of appeals for reconsideration of the fees issue by trial judges. *See, e.g., Doe v. Poelker*, 515 F.2d 541, 548 (C.A. 8, 1975); *Newman v. State of Alabama*, 522 F.2d 71, 72 (C.A. 5, 1975); *Wright v. Jackson*, 522 F.2d 955, 958 (C.A. 4, 1975), and *Wade v. Mississippi Cooperative Extension Service*, ___ F.2d ___ (C.A. 5, Feb. 24, 1976). The decisions of these courts are predicated on the standard practice of affording great weight to the exercise of a trial judge's discretion in the determination of bad faith and the appropriateness of awarding attorneys' fees. *Jenks v. Mays*, 464 F.2d 1223, 1228 (C.A. 5, 1972); *Monroe v. Board of Commissioners of City of Jackson*, 453 F.2d 259, 263 (C.A. 6, 1972); *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473, 481 (C.A. 4, 1951).

In sum, petitioners submit that the record of this case provides ample support for this Court's affirmance of the district court's award of attorneys' fees under either the bad faith exception to the American rule or the statutory authorization of Sec. 1988. Should this Court be unable to sustain an award of fees in this case based on the present record, a remand to the district court would be appropriate.

III

In discussing the appropriate statute of limitations to be applied to claims under Sec. 1981 in Virginia, defend- and Fairfax-Brewster has erroneously stated (Br. 20) that this Court's decision in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), held a one-year statute of limitations to be applicable to an action brought in Tennessee under Sec. 1981. In fact, as was specifically noted in the opinion of Mr. Justice Blackmun, the issue of the proper statute of limitations was not before the Court in that case because *certiorari* had been denied as to that question. *Johnson, supra,* at n. 7.

Respectfully submitted,

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In the Supreme Court of the United States

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

	Page
Questions presented	1
Constitutional provision and statute involved	2
Interest of the United States	2
Statement	3
Summary of argument	10
Argument:	
I. The court of appeals correctly held that 42 U.S.C. 1981 prohibits private, commercially operated, nonsectarian schools from rejecting otherwise qualified applicants on account of race	13
A. Section 1981 applies to private racial discrimination interfering with the right to make and enforce contracts	13
B. The educational relationships respondents sought to enter into with petitioners were contractual in nature and were covered by Section 1981	21
II. As applied to the petitioner schools, Section 1981 is a constitutional exercise of Congress' power to enforce the Thirteenth Amendment	25
Conclusion	36

204-511—76——1

CITATIONS

Cases:

	Page
Asheville School for Training in Christian Leadership v. *Kirk*, 269 Ill. App. 365	19
Bates v. *City of Little Rock*, 361 U.S. 516	30
Brady v. *Bristol-Myers, Inc.*, 459 F. 2d 621	14
Braunfeld v. *Brown*, 366 U.S. 599	28
Brotherhood of Railroad Trainmen v. *Virginia*, 377 U.S. 1	31
Brown v. *Board of Education*, 347 U.S. 483	21
Brown v. *Gaston County Dyeing Machine Co.*, 457 F. 2d 1377, certiorari denied, 409 U.S. 982	14
Buckley v. *Valeo*, No. 75-436, decided January 30, 1976	30
Caldwell v. *National Brewing Co.*, 443 F. 2d 1044, certiorari denied, 405 U.S. 916	14
California Bankers Assn. v. *Shultz*, 416 U.S. 21	30
Civil Rights Cases, 109 U.S. 3	13, 16, 17, 18, 20, 32, 34
Communist Party v. *Subversive Activities Control Bd.*, 367 U.S. 1	30
Cornelius v. *Benevolent Protective Order of Elks*, 382 F. Supp. 1182	24
Corrigan v. *Buckley*, 271 U.S. 323	13
Daniel v. *Paul*, 395 U.S. 298	20, 23
Eisenstadt v. *Baird*, 405 U.S. 438	35
Elfbrandt v. *Russell*, 384 U.S. 11	31
Flood v. *Kuhn*, 407 U.S. 258	18
Gibson v. *Florida Legislative Investigation Committee*, 372 U.S. 539	30
Gillette v. *United States*, 401 U.S. 437	28
Gilmore v. *City of Montgomery*, 417 U.S. 556	33, 35

Cases—Continued

	Page
Grier v. *Specialized Skills, Inc.*, 326 F. Supp. 856	19
Griffin v. *Breckenridge*, 403 U.S. 88	21
Griswold v. *Connecticut*, 381 U.S. 479	35
Head v. *Theis*, 106 N.J.L. 281	19
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241	35
Hodges v. *United States*, 203 U.S. 1	17
Hurd v. *Hodge*, 334 U.S. 24	13, 16
Jackson v. *Statler Foundation*, 496 F. 2d 623	14
Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454	*passim*
Joint Industry Board v. *United States*, 391 U.S. 224	18
Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409	*passim*
Kotch v. *Board of Pilot Commissioners*, 330 U.S. 552	34
Lombard v. *Louisiana*, 373 U.S. 267	32
Long v. *Ford Motor Co.*, 496 F. 2d 500	14
Loving v. *Virginia*, 388 U.S. 1	31
Macklin v. *Spector Freight Systems, Inc.*, 478 F. 2d 979	14
McLaurin v. *Oklahoma State Regents*, 339 U.S. 637	21
Meyer v. *Nebraska*, 262 U.S. 390	29
Missouri ex rel. Gaines v. *Canada*, 305 U.S. 337	21, 25
Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163	33
NAACP v. *Alabama*, 357 U.S. 449	9, 30
NAACP v. *Button*, 371 U.S. 415	30, 31
Norwood v. *Harrison*, 413 U.S. 455	31, 32
Olzman v. *Lake Hill Swim Club, Inc.*, 495 F. 2d 1333	23

Cases—Continued

	Page
Pierce v. *Society of Sisters*, 268 U.S. 510	19, 28, 29, 31
Phillips v. *Martin Marietta Corp.*, 400 U.S. 542	25
Railway Mail Assn. v. *Corsi*, 326 U.S. 88	24
Roe v. *Wade*, 410 U.S. 113	35
Schneiderman v. *United States*, 320 U.S. 118	31
Scott v. *Young*, 421 F. 2d 143, certiorari denied, 398 U.S. 929	23
Shelley v. *Kraemer*, 334 U.S. 1	32
Shelton v. *Tucker*, 364 U.S. 479	30
Sierra v. *Morton*, 405 U.S. 727	5
Stanley v. *Georgia*, 394 U.S. 557	35
Sullivan v. *Little Hunting Park, Inc.*, 396 U.S. 229	8, 10, 17, 21, 22, 23, 24
Sweatt v. *Painter*, 339 U.S. 629	21
Teeter v. *Horner Military School*, 165 N. C. 564	19
Tillman v. *Wheaton-Haven Recreation Assn.*, 410 U.S. 431	*passim*
United Mine Workers v. *Illinois State Bar Assn.*, 389 U.S. 217	31
United States v. *Medical Society of South Carolina*, 289 F. Supp. 145	23
United States **v.** ***Robel*****,** 389 U.S. 258	31
Virginia **v.** ***Rives*****,** 100 U.S. 313	16
Warth v. *Seldin*, 422 U.S. 490	5
Waters v. *Wisconsin Steel Works of International Harvester Co.*, 427 F. 2d 476, certiorari denied, 400 U.S. 911	14
Wisconsin **v.** ***Yoder*****,** 406 U.S. 205	28, 29
Young v. *International Telephone & Telegraph Co.*, 438 F. 2d 757	14

Constitution and statutes:

	Page
United States Constitution:	
First Amendment	28, 30
Thirteenth Amendment	*passim*
Fourteenth Amendment	15–16, 21, 33
Act of May 31, 1870, Sec. 18, 16 Stat. 144	16
Civil Rights Act of 1866, Sec. 1, 14 Stat. 27:	
42 U.S.C. 1981	*passim*
42 U.S.C. 1982	11, 14, 15, 16, 17, 18, 23, 25, 26
Civil Rights Act of 1964:	
Title II, 78 Stat. 243, 42 U.S.C. 2000a, *et seq.*	4, 14
Section 2000a(e)	23
Title IV, 78 Stat. 246, 42 U.S.C. 2000c, *et seq.*	2
Section 2000c–6	3
Title VI, 78 Stat. 252, 42 U.S.C. 2000d, *et seq.*	3
Section 2000d–6	3
Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. (Supp. IV) 2000e	18
28 U.S.C. 2403	3

Miscellaneous:

Fairman, *Oliver Wendell Holmes Devise—History of the Supreme Court of the United States: Reconstruction and Reunion 1864–88* (Part one) (1971)	17
Cong. Globe, 38th Cong., 1st Sess. 1369, 1424, 1439 (1864)	21
118 Cong. Rec. (1972):	
p. 3173	18
p. 3371	18
pp. 3372–3373	18

Miscellaneous—Continued

	Page
Hearings on Equal Educational Opportunity before the Senate Select Committee on Equal Educational Opportunity, 91st Cong., 2d Sess. (1970)	3
Henkin, *Foreword: On Drawing Lines, The Supreme Court 1967 Term,* 82 Harv. L. Rev. 63 (1968)	17
H.R. Rep. No. 92–238, 92d Cong., 1st Sess. (1971)	18

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether 42 U.S.C. 1981 prohibits private, commercially operated, nonsectarian schools from deny-

ing admission to prospective students on account of race.

2. Whether, if the first question is answered affirmatively, 42 U.S.C. 1981 is constitutional as so applied.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Thirteenth Amendment to the United States Constitution provides as follows:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, as amended, 42 U.S.C. 1981, provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

INTEREST OF THE UNITED STATES

Title IV of the Civil Rights Act of 1964, 78 Stat. 246, 42 U.S.C. 2000c, *et seq.*, confers upon the Attorney General the responsibility for initiating and maintaining certain legal actions which, in his judgment, "will materially further the orderly achievement of desegregation in public education." 42 U.S.C. 2000c–6. Title VI of the Act, 78 Stat. 252, 42 U.S.C. 2000d, *et seq.*, requires the Department of Health, Education, and Welfare to administer federal funds in a manner that ensures that local entities receiving such funds—including educational entities—do not discriminate against potential beneficiaries, *inter alia*, "on the ground of race." See 42 U.S.C. 2000d–6. If private schools, such as those involved in these cases, may lawfully deny admission to black children on account of race, and thus aid in the creation of two school systems (one private and white, the other public and desegregated), efforts to desegregate public educational systems may be seriously impaired.[1]

These cases involve, in addition, a challenge to the constitutionality of a federal statute as applied to certain private schools. The United States has a direct and immediate interest in the resolution of the constitutional issues thus presented. See 28 U.S.C. 2403.

STATEMENT

On December 19, 1972, respondents Michael McCrary and Colin Gonzales, through their parents, filed a class action against petitioners Russell and Katheryne Runyon, proprietors of Bobbe's Private School in Arlington, Virginia.[2] They alleged that they

[1] See, *e.g.*, Hearings on Equal Educational Opportunity before the Senate Select Committee on Equal Educational Opportunity, 91st Cong., 2d Sess., 1742–1743 (1970).

[2] The district court ultimately held that the suit could not be maintained as a class action (App. 138).

204-511—76——2

had been prevented from attending the school because of petitioners' policy of denying admission to blacks, in violation of 42 U.S.C. 1981 and Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. 2000a *et seq.*[3] They sought declaratory and injunctive relief as well as damages (App. 92A–99). Respondent Colin Gonzales, through his parents, filed on the same date a separate but almost identical complaint against petitioner Fairfax-Brewster School, Inc., located in Fairfax County, Virginia (App. 47–52).

The suits were consolidated, and trial was held on July 16 and 17, 1973.[4] The district court found that Fairfax-Brewster School was founded in 1954, commenced operations in 1955, and began operating a summer day camp in 1956. A total of 223 students were enrolled at the school during the 1972–1973 academic year, and 236 children attended the day camp in the summer of 1972. Bobbe's School commenced operations in 1958, and opened a day camp in 1967. An average of 200 students attend the school each year and an average of 100 children attend the day camp. Neither Fairfax-Brewster nor Bobbe's has ever enrolled a black child during the regular academic year or at its day camp (App. 133–134).

[3] Title II of the Civil Rights Act of 1964 prohibits certain forms of discrimination in specified places of public accommodation. Respondents withdrew their Title II claim prior to trial (App. 137).

[4] On July 9, 1973, the district court granted the motion of the Southern Independent School Association ("SISA") to intervene as a defendant in *McCrary* v. *Runyon* (App. 129–130). SISA is a nonprofit association comprised of six state private school associations, and represents 395 private schools (App. 121). The parties have stipulated that a substantial proportion of those schools deny admission to blacks (App. 131).

Since respondents have not sought admission to any school shown to be a member of SISA and these suits were not maintained as class actions (see n. 2, *supra*), it does not appear that a case or controversy exists between SISA and respondents. See, *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490; *Sierra Club* v. *Morton*, 405 U.S. 727.

In May 1969, Colin Gonzales' parents telephoned the Fairfax-Brewster School in response to a brochure they had received in the mail addressed to "[r]esident" and after having seen an advertisement for the school in the "yellow pages" of the telephone directory.[5] The Gonzales family subsequently visited the school and submitted an application for Colin's admission to the day camp (App. 176–181). Shortly thereafter, they received a form letter from Fairfax-Brewster stating that the school was "unable to accommodate [Colin's] application" (App. 73, 181). After receiving the rejection letter, Mr. Gonzales telephoned the Fairfax-Brewster School and spoke with the Chairman of the Board, who told Mr. Gonzales that the reason Colin's application had been

[5] The advertisement in the telephone directory included a photograph of the school building and a map permitting the public to locate the school. The advertisement also briefly described some of the school's attributes and advised the public generally that a "Comprehensive Pictorial Catalog [Is] Sent Upon Request" (App. 74).

rejected was that the school was not integrated (App. 135 n. 1, 210–211).[6]

Mr. Gonzales then telephoned Bobbe's School, from which the Gonzales family had also received a brochure addressed to "resident" (App. 220A–221). In response to a question concerning the school's admission policies, he was told that only members of the Caucasian race were accepted (App. 213). He did not file a formal application (App. 221).

In August 1972, Sandra McCrary telephoned Bobbe's School in response to an advertisement for the school in the telephone book. She inquired about nursery school facilities for her son, Michael, who is black. She then asked if the school was integrated and whether the school accepted black children. Both questions were answered negatively (App. 227–228). She did not file a formal application (App. 236A).

On the basis of this evidence, the district court found, in an opinion issued on July 27, 1973 (App. 133–142), that petitioner Fairfax-Brewster had rejected Colin Gonzales' application for admission on account of his race and that Bobbe's School had denied both children admission on account of race. The court held that Section 1981 must be read literally (App. 138–139) and that, so read, it covers petitioners'

[6] The chairman and his son denied that the conversation described by Mr. Gonzales had occurred and testified that Colin's application had been rejected because it had not been accompanied by sufficient supporting data concerning his prior schooling. The district court, however, concluded that this testimony was not believable and that Colin's application had been rejected because he is black (App. 135).

racially discriminatory admission policies. The court also held that the schools were not "truly private" since their admission policies evidenced "no 'plan or purpose of exclusiveness'" on grounds unrelated to race (App. 139). The court stated, moreover, that even if the schools were private establishments within the meaning of Title II of the Civil Rights Act of 1964, they would not be exempt from Section 1981 (App. 141). The court enjoined petitioners, and those acting on behalf of or in concert with them, from discriminating against applicants for admission on the basis of race, and awarded compensatory damages [7] and attorney's fees.[8]

The court of appeals, sitting *en banc,* affirmed by a vote of 4 to 3 the district court's order granting respondents' requests for declaratory, injunctive and monetary relief (App. 4–25).[9] The court held that there was ample evidence in the record to support the district court's determination that Fairfax-Brewster and Bobbe's School had discriminated against respondents on the basis of race (App. 10–11). The court also

[7] Colin Gonzales was awarded compensatory damages of $2,000 against Fairfax-Brewster and $500 against Bobbe's. Michael McCrary was awarded compensatory damages of $1,000 against Bobbe's (App. 142). On April 6, 1973, the district court had held that the claim of Colin Gonzales' parents for damages was barred by the two-year statute of limitations applicable in Virginia to personal injury actions (App. 119–120).

[8] Attorney's fees of $1,000 were awarded against each school (App. 142).

[9] The court of appeals reversed the award of attorney's fees (see App. 18–25).

held that the district court had concluded correctly that (App. 11)—

> Section 1981 is a limitation upon private discrimination, and its enforcement in the context of this case is not a deprivation of any right of free association or of privacy of the defendants, of the intervenor, or of their pupils or patrons.

In support of this holding, the court of appeals first noted that although it may once have been supposed that Section 1981 prohibits only legal disabilities imposed upon black persons by state law, this Court's decisions in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409; *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229; and *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. 431, firmly established that Section 1981 also reaches certain private conduct not involving state action (App. 11–12). The court stated further that the relationship respondents had sought to enter into with petitioners was undeniably contractual in nature, within the meaning of Section 1981, and it rejected petitioners' contention that Section 1981 confers no right of action unless the contractual relationship denied was available to all white persons (App. 13):

> We may not read § 1981 so restrictively as the schools would have us to do it. The school may not refuse with impunity to accept an otherwise qualified black applicant simply because it declines to admit unqualified white applicants. The section is violated by the school as long as the basis of exclusion is racial, for it is then clear that the black applicant is denied a contractual right which would have been granted to him if he had been white.

In responding to petitioners' constitutional challenge to Section 1981 as applied to private schools such as those involved in these cases, the court of appeals first acknowledged that the right of association protected by the Constitution "'is an inseparable aspect of * * * freedom of speech'" (App. 14; quoting from *NAACP* v. *Alabama*, 357 U.S. 449, 460). But the court observed that petitioners had made no showing that discontinuance of their racially discriminatory admission practices would inhibit the teaching of any particular idea or dogma (App. 14). The court also stated that Section 1981 may not be used to limit the freedom of parents to send their children to private schools having educational methods or practices not available in the public schools or to prefer one private school over another, but it concluded that a private school, "while it may exclude applicants on the basis of neutral principles, may not exclude on the basis of race" (*ibid.*).

Finally, the court of appeals rejected petitioners' contention that their racially discriminatory admission policies are protected by the constitutional right of privacy. The court reasoned that a right of privacy from governmental interference applies only in certain circumstances involving a small number of persons engaged in an essentially private activity "unintended for the public view" (App. 15):

> In such instances, it is more than likely or inevitable that there is some plan or purpose of exclusiveness other than race. When relations between husband and wife are involved,

> their purpose to exclude all the rest of the world has no racial connotations. When a school holds itself open to the public, however, or even to those applicants meeting established qualifications, there is no perceived privacy of the sort that has been given constitutional protection.

The court concluded by pointing out that although some schools may be "so private as to have a discernible rule of exclusivity which is inoffensive to § 1981" (App. 16), any such limitation on the scope of the statute is of no assistance to petitioners because the practice of exclusivity involved in these cases was shown to have been racial, rather than neutral, in nature.[10]

SUMMARY OF ARGUMENT

This Court's decisions have established that the right expressly conferred upon "[a]ll persons" by Section

[10] Three judges dissented on the merits (App. 25–34). They argued that the cases principally relied upon by the majority—*Jones* v. *Alfred H. Mayer Co.*, *supra*; *Sullivan* v. *Little Hunting Park, Inc.*, *supra*; and *Tillman* v. *Wheaton-Haven Recreation Assn.*, *supra*—were not controlling because of the difference between the right to purchase real estate, which they termed a "commercial transaction pure and simple" (App. 26), and the right to attend a private school, which was said to involve a "status" relationship between pupil and teacher and only incidentally a contract relationship. They also argued that while the mere freedom from legal disability would mean little to a black person if prospective vendors could refuse to sell him real estate on account of race, the same "basis of necessity" did not underpin the desire of a black person to attend an all-white private school, since most of the burden of education is borne by public schools which are obligated under the Constitution to admit prospective students without regard to race (App. 32–33).

1981 "to make and enforce contracts" without regard to race reaches the actions of private individuals not in any way facilitated by state law. The relationships that respondents sought to enter into with petitioners, which were refused on account of respondents' race, were undeniably contractual in nature. Although respondents apparently concede that admission to schools such as those involved here requires or constitutes entering into a contract, they contend nevertheless that Congress could not have intended such contracts to be within the scope of Section 1981 and that that statute therefore should be construed to permit them to continue their racially discriminatory admission practices.

But even if Section 1981 should be accorded something other than a purely literal interpretation, the contracts at issue in these cases are at the core of those covered by Section 1981; petitioners are not entitled, on statutory grounds, to an exemption from Section 1981 because contracts for educational services (like employment contracts) often involve long-term relationships, because some other kinds of contracts might be in some sense more "commercial," because petitioners do not accept every white applicant or because petitioners' racially discriminatory admission practices did not absolutely prevent respondents from attending school. Indeed, decisions of this Court construing Sections 1981 and 1982, which are both derived from Section 1 of the Civil Rights Act of 1866, appear

204-511—76——3

to have foreclosed granting petitioners the statutory exemption they seek.

As applied to petitioner schools, Section 1981 is a constitutional exercise of Congress' power to enforce the Thirteenth Amendment. It is settled that Congress is empowered by the Thirteenth Amendment "rationally to determine what are the badges and the incidents of slavery, and * * * to translate that determination into effective legislation." *Jones* v. *Alfred H. Mayer Co., supra*, 392 U.S. at 440. It can hardly be said that Congress' determination that racial discrimination interfering with the making and enforcing of contracts, such as the educational contracts at issue here, was irrational.

Requiring petitioners to admit prospective students without regard to race would not offend any of petitioners' constitutional rights or the constitutional rights of their present or prospective clientele. Petitioners' reliance upon decisions recognizing and protecting associational and privacy interests is misplaced. Nothing in the order entered in these cases will affect the curricula of the petitioner schools or the educational philosophies and practices of individual teachers. Both schools are private, moreover, only in the sense that they are managed by private persons and are not the direct recipients of public monies: in all other respects, including the fact that they extend to the general public through mass mailing and advertising techniques offers to contract for the provision and receipt of educational services, petitioner schools are more public than private. Appli-

cation of the contract guarantee of Section 1981 in these circumstances would offend neither associational nor privacy rights protected by the Constitution.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY HELD THAT 42 U.S.C. 1981 PROHIBITS PRIVATE, COMMERCIALLY OPERATED, NONSECTARIAN SCHOOLS FROM REJECTING OTHERWISE QUALIFIED APPLICANTS ON ACCOUNT OF RACE

A. SECTION 1981 APPLIES TO PRIVATE RACIAL DISCRIMINATION INTERFERING WITH THE RIGHT TO MAKE AND ENFORCE CONTRACTS

One of the rights expressly conferred upon "[a]ll persons" by 42 U.S.C. 1981 is the right "to make and enforce contracts" without regard to race. Whatever the understanding of the scope of this right may once have been,[11] it is now settled that Section 1981 prohibits all racial discrimination, private as well as public, interfering with the making and enforcement of contracts. This Court so held in *Tillman* v. *Wheaton-Haven Recreation Assn., supra,* and again more recently in *Johnson* v. *Railway Express Agency, Inc.,* 421 U.S. 454.

The respondents in *Tillman* operated a community swimming pool that had been built and was maintained with private funds. Membership in the pool association was "largely keyed" to residence within a certain geographical area (410 U.S. at 433). Respondents had restricted use of the pool on racial grounds, limiting

[11] See *Hurd* v. *Hodge*, 334 U.S. 24; *Corrigan* v. *Buckley*, 271 U.S. 323; *Civil Rights Cases*, 109 U.S. 3.

membership to white persons and not permitting white members to bring black persons to the pool as guests. Petitioners challenged these policies under the Civil Rights Act of 1964, 42 U.S.C. 2000a, *et seq.*, and the Civil Rights Act of 1866, as amended, 42 U.S.C. 1981 and 1982. This Court held that respondents' racially discriminatory membership policy violated Section 1982 and that the association did not qualify for an exemption, as a "truly private club" (410 U.S. at 439), from Section 2000a or Section 1981 in support of its whites-only guest policy.

Johnson, which was decided by this Court approximately one month after the court of appeals' decision here, involved a claim of racial discrimination in private employment. There this Court, as part of its *ratio decidendi* in the case, expressly approved the numerous federal court decisions holding that the prohibition in Section 1981 against racial discrimination in the making and enforcement of contracts "affords a federal remedy against discrimination in private employment on the basis of race" (421 U.S. at 460).[12]

[12] Prior to *Johnson*, the courts of appeals that had been presented with the question had concluded unanimously, in reliance on *Jones* v. *Alfred H. Mayer Co.*, *supra*, that Section 1981 prohibits racial discrimination in private employment. See, *e.g.*, *Jackson* v. *Statler Foundation*, 496 F. 2d 623 (C.A. 2); *Young* v. *International Telephone & Telegraph Co.*, 438 F. 2d 757 (C.A. 3); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F. 2d 1377 (C.A. 4), certiorari denied, 409 U.S. 982; *Caldwell* v. *National Brewing Co.*, 443 F. 2d 1044 (C.A. 5), certiorari denied, 405 U.S. 916; *Long* v. *Ford Motor Co.*, 496 F. 2d 500 (C.A. 6); *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 427 F. 2d 476 (C.A. 7), certiorari denied, 400 U.S. 911; *Brady* v. *Bristol-Meyers, Inc.*, 459 F. 2d 621 (C.A. 8); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F. 2d 979 (C.A.D.C.).

Although in neither *Tillman* nor *Johnson* did this Court extensively preface its conclusion that Section 1981 bars certain private contractual discrimination on the basis of race, that conclusion had been made all but inevitable by the Court's prior decision and opinion in *Jones* v. *Alfred H. Mayer Co.*, *supra*. The holding in *Jones* was limited, of course, to Section 1982, which prohibits among other things racial discrimination in the sale and rental of real and personal property.[13] At the same time, however, this Court necessarily intimated that the prohibitions contained in Section 1981 also reach the actions of private individuals not in any way facilitated by state law. This interpretation of Section 1981 followed principally from the fact that Sections 1981 and 1982 were both derived from Section 1 of the Civil Rights Act of 1866.[14] The legislative history relied upon in *Jones* in construing the scope of Section 1982 thus applied equally to Section 1981 (392 U.S. at 436):

[13] Specifically, this Court held in *Jones* that Section 1982 prohibits "all racial discrimination, private and public, in the sale * * * of property" (392 U.S. at 437); that "the fact that § 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem" (*id.* at 438); that Section 2 of the Thirteenth Amendment gave Congress the power "rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation" (*id.* at 440); and, finally, that Congress' determination that racial discrimination in the sale of real property constituted a badge or incident of slavery was rational (*id.* at 440–441).

[14] Sections 1981 and 1982 were originally enacted as Section 1 of the Act of April 9, 1866, 14 Stat. 27. After the Fourteenth

> In light of the concerns that led Congress to adopt [the Civil Rights Act of 1866] and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property.[15]

Amendment was ratified in 1868, Section 1 of the 1866 Act was reenacted by Section 18 of the Act of May 31, 1870, 16 Stat. 144. The text of what are now Sections 1981 and 1982 appeared almost verbatim in Section 1 of the 1866 Act; the only substantive change effected by the 1870 Act was that the guarantees of Section 1981 were extended to "[a]ll persons," rather than to citizens alone. It had been argued in the past, initially with some success (see *Hurd* v. *Hodge*, *supra*, 334 U.S. at 31–34; *Civil Rights Cases*, 109 U.S. 3, 16–17; *Virginia* v. *Rives*, 100 U.S. 313, 317–318), that the 1870 reenactment also reflected an intent on Congress' part to restrict the coverage of Sections 1981 and 1982 to circumstances involving state action under the Fourteenth Amendment. That argument was expressly rejected (after detailed consideration of its supporting authority) in *Jones* v. *Alfred H. Mayer Co.*, *supra*, 392 U.S. at 420–421 n.25, 436–437.

[15] Similarly, much of the textual analysis relied upon by this Court in *Jones* applied with equal force to Section 1981. For example, a principal basis of the holding that Section 1982 prohibits private discrimination, in addition to legal disabilities, on account of race stemmed from the explicit guarantee in that section that "[a]ll citizens * * * shall have the same right * * * as is enjoyed by white citizens * * * [to] purchase [and] lease * * * real and personal property." Section 1981 contains a parallel guarantee that "[a]ll persons * * * shall have the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens * * *" (see 392 U.S. at 420–422).

Indeed, this Court specifically indicated in *Jones* that the power conferred upon Congress by Section 2 of the Thirteenth Amend-

ment "rationally to determine what are the badges and the incidents of slavery" (392 U.S. at 440) extends, *inter alia*, to the "right to make and enforce contracts" (secured by Section 1981) as well as the right "to inherit, purchase, lease, sell and convey property" (secured by Section 1982) (392 U.S. at 441 and n.78, quoting the *Civil Rights Cases*, *supra*, 109 U.S. at 22). And, significantly, the holding in *Hodges* v. *United States*, 203 U.S. 1—which had been premised upon a view of Section 1981 as limited to conduct actually enslaving the person discriminated against—was expressly overruled in *Jones* as "incompatible with the history and purpose of the [Thirteenth] Amendment" (392 U.S at 441–443 n. 78).

See also *Sullivan* v. *Little Hunting Park, Inc.*, *supra*; and cases cited in n. 12, *supra*.

Although *Jones* was decided over the dissent of two members of the Court, and the construction of Section 1982 as reaching purely private conduct has been the subject of some critical commentary,[16] the holding in that case has been reaffirmed, first by a divided Court in *Sullivan* and then by a unanimous Court in *Tillman*, and is thus no longer open to dispute as a matter of statutory interpretation. The extension of the holding in *Jones* to Section 1981—first in *Tillman* and subsequently in *Johnson*—is similarly settled.[17] Had Congress disapproved of this Court's interpretation of the scope of Sections 1981 and 1982, it could have amended the Civil Rights Act of 1866; all attempts to

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[16] *E.g.*, Fairman, *Oliver Wendell Holmes Devise—History of the Supreme Court of the United States: Reconstruction and Reunion 1864–88* (Part One), pp. 1207–1258 (1971); Henkin, *Foreword: On Drawing Lines, The Supreme Court 1967 Term*, 82 Harv. L. Rev. 63, 85–86 (1968).

[17] Petitioners' extensive reliance (Runyon Br. 7–8, 10–11, 15; Fairfax-Brewster Br. 9–10, 14–15, 19–20, 54–58; SISA Br. 20) upon the *Civil Rights Cases*, *supra*, is unpersuasive. The *Civil Rights Cases* did not involve the Civil Rights Act of 1866, but

do so, however, have been defeated.[18] Cf., *e.g.*, *Flood* v. *Kuhn*, 407 U.S. 258; *Joint Industry Board* v. *United States*, 391 U.S. 224, 228–229.

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rather the Civil Rights Act of 1875, 18 Stat. 335—and, as this Court noted in *Jones*, the present vitality of the holding in the case has been rendered "largely academic by [the enactment of] Title II of the Civil Rights Act of 1964" (392 U.S. at 441 n. 78). To the extent that the Court's opinion in the *Civil Rights Cases* contains dicta arguably supporting petitioners' contentions, moreover, those dicta, in light of *Jones* and subsequent decisions, can no longer be considered authoritative. See n. 20 and p. 34, *infra*.

[18] The legislative history of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, as amended, 42 U.S.C. (Supp. IV) 2000e, contains significant evidence of congressional approval of this Court's interpretation of the scope of Sections 1981 and 1982. For example, in responding to Senator Hruska's proposal to make Title VII of the Civil Rights Act of 1964 and the Equal Pay Act the exclusive federal remedies in cases of employment discrimination, Senator Williams informed his colleagues that the right to redress individual acts of employment discrimination had first been provided by Sections 1981 and 1982. He noted that this Court had held in *Jones* that the 1866 Act provided means of securing fundamental constitutional guarantees—including the right to contract for one's labor free from private racial discrimination. 118 Cong. Rec. 3371 (1972). In offering his amendment, Senator Hruska had argued that employees should be prevented from bypassing the Equal Employment Opportunity Commission and the National Labor Relations Board by filing complaints in federal court under the provisions of the Civil Rights Act of 1866. *Id.* at 3173. Senator Hruska's proposed amendment was ultimately defeated. *Id.* at 3372–3373; see also H.R. Rep. No. 92-238, 92d Cong., 1st Sess., 19 (1971); *Johnson* v. *Railway Express Agency, Inc.*, *supra*, 421 U.S. at 459.

B. THE EDUCATIONAL RELATIONSHIPS RESPONDENTS SOUGHT TO ENTER INTO WITH PETITIONERS WERE CONTRACTUAL IN NATURE AND WERE COVERED BY SECTION 1981

In applying, or taking preliminary steps toward applying, for admission to Fairfax-Brewster and Bobbe's School, respondents sought to enter into contractual relationships with petitioners. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 532–533.[19] Like all contractual relationships, those at issue here would have involved a set of mutual benefits and obligations for the contracting parties: most importantly, in return for the educational services provided by petitioners, respondents would have been obligated to pay fees and tuition pursuant to an agreed upon payment schedule.

Petitioners do not seriously dispute the proposition that admission to the schools involved here requires or constitutes entering into a contract. They contend, however, that Congress could not have intended contracts for admission to private schools to be within the scope of Section 1981 and that that statute therefore should be construed to permit private schools to deny admission on account of race. We disagree. For even on the assumption that the right to contract guaranteed in Section 1981 should be accorded some-

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[19] Accord, *e.g.*, *Asheville School for Training in Christian Leadership* v. *Kirk*, 269 Ill. App. 365, 369; *Teeter* v. *Horner Military School*, 165 N.C. 564, 571; *Head* v. *Theis*, 106 N.J.L. 281, 283–284; cf. *Grier* v. *Specialized Skills, Inc.*, 326 F. Supp. 856, 861 (W.D. N.C.).

thing other than a purely literal interpretation,[20] we submit that the contracts at issue in these cases are at the core of those covered by Section 1981 as interpreted by this Court—and do not require the Court to fashion an exception to the observation in *Jones* that in enacting the Civil Rights Act of 1866 Congress "meant exactly what it said" (392 U.S. at 422).

Neither the text of Section 1981 nor this Court's authoritative analysis of the congressional intent in enacting it supports petitioners' contention that contracts involving a continuing relationship rather than a shorter-term, "purely commercial" relationship are outside the intended scope of that statute. Section 1981 guarantees to "[a]ll persons" the right "to make and enforce contracts": had Congress intended to limit that guarantee along the lines suggested by petitioners, it presumably would have done so. Judicial recognition of so sweeping an exception to the plain terms of the statute "would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866 * * *

[20] Under the *Civil Rights Cases*, *supra*, 109 U.S. at 24–25, a narrowing construction would be required to preserve the 1866 Act's constitutionality. However, the Court's treatment of the Section 1981 claim in *Tillman* v. *Wheaton-Haven Recreation Assn.*, *supra*, 410 U.S. at 439–440, suggests that the limited view of congressional power to enforce the Thirteenth Amendment reflected in the holding in the *Civil Rights Cases* may well be inconsistent with the rationale of *Jones* and subsequent decisions of this Court. See *Jones* v. *Alfred H. Mayer Co.*, *supra*, 392 U.S. at 441 n. 78; cf. *Daniel* v. *Paul*, 395 U.S. 298, 309 (Black, J., dissenting on other grounds). For the reasons stated in the text above, we see no need for the Court to address this question in the present cases. See also p. 34, *infra*.

from which § [1981] was derived." *Sullivan* v. *Little Hunting Park, Inc.*, *supra*, 396 U.S. at 237.[21]

In determining whether the "sweeping * * * protection" of Section 1981 appropriately applies in the context of private as well as public schools, it is significant that the concept of a public education, financed by general tax revenues, had not yet taken hold in the South when the Reconstruction legislation was enacted and the Thirteenth and Fourteenth Amendments were adopted. White children in the South were at that time educated primarily in private schools, while black children received virtually no education. Indeed, the laws in some states forbade educating black persons. *Brown* v. *Board of Education*, 347 U.S. 483, 489–490. Since the importance of providing black persons with educational opportunities was a factor repeatedly mentioned by proponents of the Thirteenth Amendment (see, *e.g.*, Cong. Globe, 38th Cong., 1st sess., 1369, 1424, 1439 (1864)), it is apparent that application of the protections of the Civil Rights Act of 1866 to private as well as public education would be required to accomplish the congressional purpose of enforcing that Amendment.[22]

[21] Indeed, "[t]he approach of this Court to * * * [the] Reconstruction civil rights statutes" generally in recent years "has been to 'accord [them] a sweep as broad as [their] language.'" *Griffin* v. *Breckenridge*, 403 U.S. 88, 97.

[22] Moreover, this Court has long recognized the important interrelationship in the civil rights field between educational opportunities and employment opportunities. See, *e.g.*, *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337; *Sweatt* v. *Painter*, 339 U.S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637. Accordingly, the ruling in *Johnson* v. *Railway Express Agency, Inc.*, *supra*, that Section 1981 applies to employment contracts suggests, by analogy, that it also applies to contracts for the education—which is the preparatory vocation—of children.

Furthermore, whatever the phrase "purely commercial" may mean in the present context, it is difficult to understand how the contracts at issue in these cases are less "commercial" than were the contracts involved in cases such as *Tillman*. It was no less true in *Tillman* than here that any contractual relationship was merely incidental to an underlying primary activity—in that case, use of a neighborhood swimming pool. Similarly, the employment contract involved in *Johnson*—like the recreational contracts in *Tillman* and *Sullivan*—simply formalized the mutual obligations owed and the benefits anticipated from a long-term, continuous relationship. Indeed, under *Johnson* Section 1981 presumably covers the petitioner schools' employment contracts with their faculty and staff—contracts which can establish continuous relationships longer in duration than the schools' educational relationship with any individual student. There is no reason why the same statutory requirement of nondiscrimination that applies to the schools' employment contracts should not also apply to the schools' educational contracts.

It is, moreover, at least arguable that the contracts at issue here are more "commercial" than the contracts in *Tillman* and *Sullivan*. Although membership in the recreational associations considered in *Tillman* and *Sullivan* was virtually automatic so long as the applicant lived within a particular geographic area, was financially capable of paying the required fees, and was white, neither association advertised its services to the public generally. The schools here, how-

ever, do solicit clientele from the general public: as noted earlier, both Fairfax-Brewster and Bobbe's School advertise in the "yellow pages" of the telephone directory and employ blanket mailing techniques in an effort to attract students. Like contracts for employment,[23] public accommodations,[24] or recreational services,[25] then, the contracts at issue here are contracts for goods or services and their characteristics are of a "commercial" nature that are within the coverage of Section 1981 as interpreted by this Court.[26]

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[23] See, *e.g.*, cases cited in n. 12, *supra*.

[24] See, *e.g.*, *United States* v. *Medical Society of South Carolina*, 298 F. Supp. 145 (D. S.C.) (private hospital).

[25] See, *e.g.*, *Olzman* v. *Lake Hill Swim Club, Inc.*, 495 F. 2d 1333 (C.A. 2) (privately owned swimming club); *Scott* v. *Young*, 421 F. 2d 143 (C.A. 4), certiorari denied, 398 U.S. 929 (privately owned recreational facility).

[26] The respondents in *Sullivan* and *Tillman* argued that the prohibitions contained in the Civil Rights Act of 1866 were not applicable to them because the associations there involved qualified as "private club[s] or other establishment[s] not in fact open to the public," within the meaning of the public accommodations provisions of the Civil Rights Act of 1964 (42 U.S.C. 2000a(e)), and that the latter statute worked an implied partial repeal of the Civil Rights Act of 1866. In neither case, however, did this Court find it necessary to decide whether the exemption in the 1964 Act narrowed by implication the scope of Section 1981 or Section 1982 because it found that the association had "no plan or purpose of exclusiveness" on grounds other than race and held that, as a consequence, neither qualified under the private club exemption contained in the 1964 Act (*Sullivan* v. *Little Hunting Park, Inc.*, *supra*, 396 U.S. at 236 (citing *Daniel* v. *Paul*, 395 U.S. 298, 301-302); *Tillman* v. *Wheaton-Haven Recreation Assn.*, *supra*, 410 U.S. at 438).

The present cases also do not require this Court to consider the effect of the "private club" exemption in the 1964 Act on the reach

We also believe that the court of appeals correctly rejected petitioners' contention that Section 1981 confers no judicially enforceable right in the absence of a showing that the schools would have accepted every white applicant. Section 1981 does not bar schools such as petitioners from using racially non-discriminatory criteria in screening applicants for admission, any more than it would have prevented the employer in *Johnson* from discharging employees found to be performing their duties unsatisfactorily. Under this Court's decisions, Section 1981 does, however, prohibit private contractual discrimination on the basis of race. As the court of appeals stated, Section 1981 "is violated by the school as long as the basis of [the applicant's] exclusion is racial, for it is then clear that the black applicant is denied a contractual right which would have been granted to him if he had been white" (App. 13).[27] Discrimination on the basis of race occurs

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of Section 1981 since, again, the exclusionary principle at issue here is racial, rather than neutral, in nature and, as the court of appeals noted, the schools' "actual and potential constituency * * * is more public than private" (App. 17). Compare *Cornelius* v. *Benevolent Protective Order of Elks*, 382 F. Supp. 1182 (D. Conn.) (three-judge court). It is, of course, settled that the public accommodations provisions of the 1964 Act preserved, rather than superseded, remedies under the 1866 Act. *Sullivan* v. *Little Hunting Park, Inc.*, *supra*, 396 U.S. at 237–238.

[27] It is, of course, no basis for objection that Section 1981 thus coerces private parties to enter into contracts they would not otherwise enter into, in a manner inconsistent with otherwise generally applicable contract principles. That is necessarily the effect of the contract provision of Section 1981, wherever it applies. See *Railway Mail Assn.* v. *Corsi*, 326 U.S. 88, 93–94.

if "persons of like qualifications" are not afforded equal "opportunities irrespective of their [race]." *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544.

Finally, petitioners' racially discriminatory admission policies are not any less within the reach of Section 1981 because those policies did not prevent respondents from attending a publicly funded school or another private school. The essential fact found by the district court, and concurred in by the court of appeals, is that respondents were denied the opportunity to enter into contracts because of their race. In order to establish a violation of Section 1981, respondents were not required further to prove that that denial absolutely prevented them from attending school, any more than the employee in *Johnson* would have had to prove that he could not secure alternative employment, or the plaintiffs in *Tillman* that they could not gain admission to any other swimming pool, or the plaintiffs in *Jones* that they could not secure alternative housing, as part of their affirmative cases under Section 1981 or Section 1982. Cf. *Missouri ex rel. Gaines* v. *Canada*, *supra*, 305 U.S. at 348–350.

II

AS APPLIED TO THE PETITIONER SCHOOLS, SECTION 1981 IS A CONSTITUTIONAL EXERCISE OF CONGRESS' POWER TO ENFORCE THE THIRTEENTH AMENDMENT

This Court held in *Jones* v. *Alfred H. Mayer Co.*, *supra*, that Congress has the power under the Thirteenth Amendment to do precisely what Section

1982 "purports to do: to prohibit all racial discrimination, private and public, in the sale and rental of property" (392 U.S. at 437). In reaching that conclusion, the Court first reaffirmed the long-standing principle that legislation enforcing the Thirteenth Amendment may reach beyond actions sanctioned by state law to regulate the conduct of private individuals. The question, then, was whether the authority of Congress to enforce the Thirteenth Amendment "by appropriate legislation" includes the power to eliminate all racial barriers to the acquisition of real and personal property. This Court answered that question affirmatively, holding that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation" (392 U.S. at 440).

Section 1981, as applied to schools such as those involved in these cases, similarly is a constitutional exercise of Congress' power to enforce the Thirteenth Amendment. As noted earlier, at the time the Civil Rights Act of 1866 was enacted, the education of children was a function performed in the South primarily by private groups and institutions. The ability of former slaves to secure an education depended upon both the elimination of laws restricting educational opportunities on racial grounds and the removal of racial barriers to the admission of black persons to private educational institutions. And this Court has already held in *Johnson* v. *Railway Ex-*

press Agency, Inc., supra, and *Tillman* v. *Wheaton-Haven Recreation Assn., supra,* that the pervasive discrimination that interfered with the making and enforcing of contracts by black persons was an evil Congress specifically sought to remedy in Section 1 of the Civil Rights Act of 1866. The congressional determination that such discrimination constituted a badge or incident of slavery—whether it interfered with the right of black persons to market their labor or to secure an education by contract—can hardly be said to be irrational.

Petitioners contend, however, that if Section 1981 were construed to prohibit them from continuing their racially discriminatory admission policies, it would impair their rights of free association and privacy. They urge that the associational and privacy interests at stake in these cases require this Court to hold that they have a constitutional right to deny admission on account of race. They also contend more generally that parents have a right, protected by the Constitution, to control or direct the education of their children and that the decision of the courts below in these cases fails adequately to respect that right.

In addressing these arguments, it is useful to note first what these cases do not involve. So far as appears from the record, both Fairfax-Brewster and Bobbe's School were organized in response to secular considerations and their educational policies are not designed to propagate the tenets of any particular religion. Both schools also apparently accept students without

regard to those students' religious affiliations, or lack thereof.[28] Requiring petitioners to accept students without regard to race thus will not affect the religious practices of petitioners, or of their present or prospective clientele. In short, these cases do not in any way require the Court to reconcile the guarantees of the Thirteenth Amendment with the Free Exercise Clause of the First Amendment. See, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205; *Gillette* v. *United States*, 401 U.S. 437; *Braunfeld* v. *Brown*, 366 U.S. 599.

Nor do these cases involve a challenge to the existence of private schools generally, or of these schools in particular, to the right of parents to send their children to a private rather than to a public school or to prefer one private school over another. Petitioners' reliance upon *Pierce* v. *Society of Sisters*, *supra*, in which this Court invalidated a state statute

[28] Although the application form used by the Fairfax-Brewster School requests disclosure of the child's religion (App. 64) and grace is apparently said at snack-time (App. 82), nothing in the record suggests either that the information concerning an applicant's religion is used to exclude some applicants or that religious instruction is part of the school's curriculum or educational mission. In describing its educational objectives and practices, Fairfax-Brewster has suggested only that its curriculum is "geared to high standards of excellence, and [that] it practices selectivity in the admission of students on the basis of sound educational standards and criteria, including readiness, previous school record, age, and mental, physical and emotional maturity" (Fairfax-Brewster Br. 5).

The application form used by Bobbe's School does not ask for any information concerning the applicant's religion (App. 148–A), and nothing in the record suggests that religious instruction forms any part of the curriculum of the school.

requiring parents to send their children to public schools, is consequently misplaced. The decisions in *Pierce* and related cases expressly recognized, moreover, that the rights of private schools to exist and of parents to control the rearing and education of their children by enrolling them in private schools are subject to reasonable governmental regulations. *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 213; *Pierce* v. *Society of Sisters*, *supra*, 268 U.S. at 534; *Meyer* v. *Nebraska*, 262 U.S. 390, 401–403.

Nothing in the order entered in these cases will affect the curricula at Fairfax-Brewster or Bobbe's School or the educational philosophies or practices of individual teachers or of the schools. To the extent that efforts may be made at Fairfax-Brewster and Bobbe's to convey a belief in the desirability of racial segregation generally or the uniqueness of particular racial attributes, for example, the decision below would not prevent the continuation of those efforts. As noted by the court of appeals, "[h]ere, at least, there is no showing that discontinuance of [the schools'] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma" (App. 14).

What these cases do involve are the practice, engaged in by two commercially operated, nonsectarian schools, of denying admission to otherwise qualified applicants on account of race. As noted earlier, both of the schools involved here extend to the general public offers to contract for the provision and receipt of

educational services. They do so through the use of mass mailing techniques and other advertising directed at the general public. As the court of appeals concluded (App. 16–17):

> The schools are private only in the sense that they are managed by private persons and they are not direct recipients of public funds. Their actual and potential constituency, however, is more public than private.

We submit that as applied to these schools, Section 1981 offends neither associational nor privacy rights protected by the Constitution.

The freedom to associate invoked by petitioners in support of their racially discriminatory admission policies bears little relation to the constitutionally protected associational interests that have been recognized by this Court. The doctrine of freedom of association is based principally on rights specifically enumerated in the First Amendment—particularly freedom of speech and of assembly—and in essence recognizes a concomitant right to join with others to express or promote political and other ideas.[29] See *NAACP* v. *Button*, 371 U.S. 415; *NAACP* v. *Alabama*, 357 U.S. 449. It protects individuals and groups from unwarranted or overbroad governmental intrusions

[29] See, *e.g.*, *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539; *Shelton* v. *Tucker*, 364 U.S. 479; *Bates* v. *City of Little Rock*, 361 U.S. 516; *NAACP* v. *Alabama*, *supra*; cf. *Communist Party* v. *Subversive Activities Control Bd.*, 367 U.S. 1. See also *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 55–56; *Buckley* v. *Valeo*, No. 75–436, decided January 30, 1976, slip op., pp. 58–79.

jeopardizing the existence of the group by unjustifiably compelling disclosure of the identity of group members or supporters,[30] penalizing individuals for joining groups engaged in legitimate activities[31] or frustrating the achievement of lawful group objectives.[32]

The present cases involve neither a practice that has heretofore been accorded constitutional protection nor governmental regulation of a type that has been recognized as impairing freedom of association. Petitioners premise their contention that they have a constitutional right to discriminate upon the basis of race on isolated language from opinions of this Court dealing with factual circumstances significantly different from the situation here. Thus, petitioners rely heavily upon this Court's statement in *Norwood* v. *Harrison*, 413 U.S. 455, 469 (emphasis added), that "private bias [in the admission of students to private schools] is not barred by the Constitution, *nor does it invoke any sanction of laws*, but neither can it call on the Constitution for material aid from the State."

[30] To the extent that freedom to associate is also an ingredient of the due process holdings of such cases as *Pierce* v. *Society of Sisters*, *supra*, and *Loving* v. *Virginia*, 388 U.S. 1, 12 ("freedom to marry"), no such associational interest would be impaired by the application of Section 1981 here (which would not prevent any individuals from associating in private schools).

[31] See, *e.g.*, *United States* v. *Robel*, 389 U.S. 258; *Elfbrandt* v. *Russell*, 384 U.S. 11; *Schneiderman* v. *United States*, 320 U.S. 118.

[32] See, *e.g.*, *United Mine Workers* v. *Illinois State Bar Assn.*, 389 U.S. 217; *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1; *NAACP* v. *Button*, 371 U.S. 415.

First, we submit that petitioners and the dissenting judges below [33] have misread the italicized language in the above quotation. We understand the italicized language not as purporting to decide whether any provision in the United States Code is inconsistent with the school practices there involved—a matter not briefed or argued in that case—but instead as a descriptive statement that the private bias in that case was not supported by state action (other than the "material aid" of state-furnished textbooks at issue in the case). Compare, *e.g., Shelley* v. *Kraemer,* 334 U.S. 1; *Lombard* v. *Louisiana,* 373 U.S. 267. Indeed, the word "sanction" has long and repeatedly been used by this Court in similar contexts in referring to the element of state action. See, *e.g., Civil Rights Cases,* 109 U.S. 3, 23 ("whether sanctioned by State legislation or not"; "without any sanction or support from any State law or regulation"); *Jones* v. *Alfred H. Mayer Co., supra,* 392 U.S. at 438 (quoting from *Civil Rights Cases*); *Tillman* v. *Wheaton-Haven Recreation Assn., supra,* 410 U.S. at 435 ("the statute reaches beyond state action and is not confined to officially sanctioned segregation").

In any event, *Norwood* involved only the extent to which states may provide material aid indirectly benefiting private schools having racially discriminatory admission policies rather than whether Section 1981 is constitutional as applied to private, commercially

[33] The dissenting judges on the court of appeals equated the italicized language with a statement by this Court that the discrimination at issue here is not "subject to sanction of law" (App. 34).

operated nonsectarian schools. This Court went on to state in *Norwood,* moreover, that (413 U.S. at 470)—

> Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under §2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts [footnote citing examples omitted].

Petitioners also rely heavily upon the following passage in Mr. Justice Douglas' dissenting opinion in *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 179–180:

> The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.

This statement was quoted approvingly in Mr. Justice Blackmun's opinion for the Court in *Gilmore* v. *City of Montgomery,* 417 U.S. 556, 575. But the principal question presented in both *Gilmore* and *Moose Lodge* was whether the racially discriminatory activities of private groups had involved sufficient "state action" to constitute a violation of the Equal Protection Clause of the Fourteenth Amendment—a question far removed from that presented here. In neither *Gilmore* nor *Moose Lodge* did this Court's decision turn on whether private groups have a constitutional right to

discriminate on the basis of race, and the constitutionality of Section 1981 as applied to schools such as those involved here was not an issue decided either expressly or by implication in those cases.

The considerations reflected in the above quotation may well suggest that the right-to-contract provision of Section 1981 should be construed, in a manner reminiscent of the distinction between civil rights and social rights adopted in the *Civil Rights Cases* (109 U.S. at 22), as not extendng to membership in "private clubs" (see n. 26, *supra*) or to certain other non-commercial or intimate personal relationships. Similarly, the example given by the court below of siblings joining together to employ tutors for their children (App. 16) suggests that Section 1981 does not prohibit the use in appropriate circumstances of legitimate principles of selectivity which have the effect of excluding all others irrespective of race.[34] In our view, affirmance of the judgment below would not in any way require the Court to reject these possibilities for principled limitation of the reach of the contract provision of Section 1981.

In fact, the arguments made by petitioners in support of their racially discriminatory admission policies relate tenuously, if at all, to the freedom of association protected by the Constitution. Petitioners are asserting in these cases not a right of association withheld from the general public, but a right of exclusion—an

[34] *Kotch* v. *Board of Pilot Commissioners*, 330 U.S. 552, classically illustrates the difficulty that can arise in determining when far-reaching use of such selective criteria amounts to a practice of discriminatory exclusion.

assertion that relates more directly to privacy claims than to associational interests. Indeed, the right thus asserted conflicts with, rather than furthers, freedom of association in certain respects: as this Court noted in *Gilmore*, "[i]nvidious discrimination takes its own toll on the freedom to associate * * *" (417 U.S. at 575).[35]

But a constitutional right of privacy, precluding governmental regulation, has been recognized only in limited contexts involving the home or procreation. See *Roe* v. *Wade*, 410 U.S. 113 (the right to obtain an abortion); *Eisenstadt* v. *Baird*, 405 U.S. 438 (the right of unmarried couples to obtain contraceptives); *Stanley* v. *Georgia*, 394 U.S. 557 (the right to possess obscene materials in one's home); *Griswold* v. *Connecticut*, 381 U.S. 479 (the right of married couples to obtain contraceptives). The policies challenged in the present cases are not entitled to an immunity from Section 1981 on privacy grounds. The education of children is a public concern and, as noted earlier, private schools have long been held to be subject to reasonable governmental regulation. The schools involved here are "private," moreover, only in the sense that they receive no government aid: their actual and potential constituencies, the functions they perform, and the means they use to solicit students are drawn from or directed toward and involve the general public.

[35] Cf. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 260–261 (rejecting "the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-62, 75-66 and 75-278

RUSSELL L. RUNYON, et ux, *Petitioners,*

v.

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE AND BRIEF FOR COUNCIL FOR AMERICAN PRIVATE EDUCATION, NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS AND SOUTHERN ASSOCIATION OF INDEPENDENT SCHOOLS AS AMICI CURIAE

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INDEX

	Page
MOTION	1
BRIEF	5
INTRODUCTION	6
ARGUMENT	
Application of 42 U.S.C. § 1981 So As To Prohibit Rejection By Petitioner Schools Of Respondent Children Because Of Their Race Does Not Violate Any Constitutional Rights Of The Schools, Children Who Attend Them, Their Parents, Or Private Schools Generally	9
CONCLUSION	21

TABLE OF AUTHORITIES

Cases:

Bond v. Floyd, 385 U.S. 116 (1966)	13
District of Columbia v. Thompson Co., 346 U.S. 100 (1953)	20
Elfbrandt v. Russell, 384 U.S. 11 (1966)	13
Farrington v. Tokushige, 11 F.2d 710 (9th Cir. 1926), aff'd 273 U.S. 284 (1927)	10
Gilmore v. City of Montgomery, 417 U.S. 556 (1964)	15

Page

Green v. Connally,
330 F. Supp. 1150 (D.D.C. 1971), aff'd sub. nom.
Coit v. Green, 404 U.S. 997 (1971) 15, 19

Grier v. Specialized Skills, Inc.,
326 F. Supp. 856 (W.D. N.C. 1971) 8

Griffin v. Breckenridge,
403 U.S. 88 (1971) 20

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 20

Griswold v. Connecticut,
381 U.S. 479 (1965) 15

Heart of Atlanta Motel v. United States,
379 U.S. 241 (1964) 20

Johnson v. Railway Express Agency,
421 U.S. 454 (1975) 7

Jones v. Alfred H. Mayer Co.,
392 U.S. 409 (1968) 7, 20

Meyer v. Nebraska,
262 U.S. 390 (1923) 10

Meyerkorth v. State,
173 Neb. 889, 115 N.W.2d 585 (1962) 10

Murray v. Jamison,
333 F. Supp. 1379 (W.D. N.C. 1971) 13

N.A.A.C.P. v. Alabama,
357 U.S. 449 (1958) 13, 20

Norwood v. Harrison,
413 U.S. 455 (1973) 9, 15, 19, 20

Page

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 9

Schneider v. State of New Jersey,
308 U.S. 147 (1939) 20

Schneider v. Smith,
390 U.S. 17 (1968) 13

Schneiderman v. United States,
320 U.S. 118 (1943) 13

Scott v. Young,
421 F.2d 143 (4th Cir. 1970),
cert. denied 398 U.S. 929 (1970) 7

Sims v. Order of United Commercial Travelers
of America, 343 F. Supp. 112 (D. Mass. 1972) 7

State v. Superior Court,
55 W.2d 177, 346 P.2d 999 (1959)
cert. denied sub. nom. Wold v. Shoreline
School District, 363 U.S. 814 (1960) 10

State v. Williams,
253 N.C. 337, 117 S.E.2d 444 (1960) 10

Sullivan v. Little Hunting Park,
396 U.S. 229 (1969) 7, 14

Tillman v. Wheaton Haven Recreatonal Association,
Inc., 410 U.S. 431 (1973) 7, 10, 15, 20

United States v. Hunter,
459 F.2d 205 (4th Cir. 1972),
cert. denied 409 U.S. 934 (1972) 20

United States v. Korner,
56 F. Supp. 242 (S.D. Cal. 1944) 13

	Page
United States v. Robel, 389 U.S. 258 (1967)	13, 20
Wisconsin v. Yoder, 406 U.S. 205 (1972)	9
Zucht v. King, 260 U.S. 174 (1922)	10
Statutes:	
28 U.S.C., § 1981	3, 6
42 U.S.C., § 1982	7
42 U.S.C. § 2000a	20
42 U.S.C., § 2000e	20
42 U.S.C., § 3601	20
Miscellaneous:	
Comment, *Segregation in Private Schools*, 122 U. Penna. L. Rev. 471 (1973)	14
Sengstrocks, *Discrimination: A Constitutional Dilemma*, 9 Wm. & Mary L. Rev. 59 (1968)	14

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MOTION OF COUNCIL FOR AMERICAN PRIVATE EDUCATION, NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS AND SOUTHERN ASSOCIATION OF INDEPENDENT SCHOOLS FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Council for American Private Education, National Association of Independent Schools and Southern Association of Independent Schools respectfully move this Court for leave to file the accompanying brief as amici curiae in support of the position of respondents in these three cases.

Written consent to the filing of this brief was requested of the parties but has not been unanimously granted.

Identification of Amici Curiae. Each of the three organizations filing this Motion is, directly or indirectly, an association of private schools. Allowing for some overlapping in membership among them, amici curiae as a group include within their membership some 13,500 private schools, accounting for well over ninety percent of the non-public school enrollment in the United States.

The Council for American Private Education is an association of eleven groups, each of which is itself an association of private schools. The Council's member groups are the following:

American Lutheran Church, Division of Parish Education
American Montessori Society
Association of Military Colleges and Schools of the U.S.
Friends Council on Education
Lutheran Church - Missouri Synod, Board of Parish Education
National Association of Episcopal Schools
National Association of Independent Schools
National Catholic Educational Association
National Society for Hebrew Day Schools
National Union of Christian Schools
U.S. Catholic Conference.

The National Association of Independent Schools, the second of the amici curiae, has been in existence in its present form since 1962, when it resulted from a merger of two independent schools associations dating back to 1924 and 1942 respectively. Its membership consists of 725 elementary and secondary schools of various kinds throughout the U.S.: there are 64 Affiliate members, independent schools

outside the U.S.; and there are 56 Association members, made up of 35 state, regional and local associations of independent schools; 4 denominational associations; 10 special purpose associations; and 7 administrators' and teachers' associations. Almost all of the state, regional and local associations of schools are made up of schools which themselves are NAIS members.

The third of the amici curiae is the Souther Association of Independent Schools (not to be confused with the Southern Independent School Association, Intervenor below), the membership of which includes 138 private schools.

The Interest of Amici Curiae. In this case respondents, black children and their parents, claim that the refusal of petitioner schools to admit respondent children was because of race and constituted a violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981. Petitioner Southern Independent School Association (referred to herein as "SISA", in order to avoid confusion with amicus curiae Southern Association of Independent Schools) intervened in the District Court, claiming to represent "non profit, private white schools in seven states and the class of all similarly situated schools and their associated students and parents".

SISA has argued that 42 U.S.C. § 1981 should not be construed so as to prohibit racial discrimination by private schools, and that a construction that it does prohibit such discrimination would constitute a violation of rights of private schools, their students and parents, under the Constitution. Implicit in the assertions in SISA's pleadings in the District Court is that SISA speaks for and expresses the views of a significant segment of the community of private schools.

Amici curiae do not purport to speak for all private schools, or even all which are affiliated with them. They do, however, express the views of their associations, and of a very sizeable number of private schools which, in affiliating with one or more of amici curiae, have placed themselves on record as being unalterably opposed to the practice of racial discrimination against black persons in private education. They submit this brief in order to demonstrate that the associations representing the overwhelming percentage of private schools in this country believe that the decision below was correct, and that the application of 42 U.S.C. § 1981 to private schools does not constitute an unwanted or unreasonable interference with what they consider to be the legitimate operations or prerogatives of private schools. Amici curiae welcome the decision below as an added means by which the stain of racial discrimination in American education can be the sooner removed, and the opportunity of a private education be available to those black persons as well as those white persons who seek it and can qualify for it.

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BRIEF OF COUNCIL FOR AMERICAN PRIVATE EDUCATION, NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS AND SOUTHERN ASSOCIATION OF INDEPENDENT SCHOOLS AS AMICI CURIAE

This brief is filed by the aforenamed organizations, contingent upon the Court's granting the foregoing motion for leave to file a brief as amici curiae. The interest of the amici curiae is set forth in the motion.

INTRODUCTION

The purpose of this brief is to bring before the Court the point of view of amici curiae only on such issues in these cases as are particularly within their purview, and concerning which their first hand knowledge and experience may be helpful to the Court. Accordingly, and except for the following brief discussion, amici curiae will contend in this brief only that 42 U.S.C. § 1981,[1] as applied below, does not violate any constitutional rights of private schools or of those who attend them.[2]

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[1] "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . .". (42 U.S.C. § 1981).

[2] Except where otherwise indicated, the designation "private school" in this brief refers to schools which, though they render a public service recognized by governments, are private in the sense that they are not operated by government. In that sense, and that sense alone, petitioner schools are "private schools". The record in these cases indicates that petitioner schools solicited students from the general public, through the mails and through telephone directory advertising. It is clear, therefore, that petitioner schools are not "private" as that term is used in another sense (and as the term is frequently used in petitioners' briefs in this Court) to refer to the essentially personal relationship involved when a group of persons, usually small in number, having some common element of interest and known to each other, gather together for a social or similar common purpose. While the record does not set forth the size of each of the schools affiliated with SISA, it does indicate (SISA's Motion to Intervene, A. 121) that SISA's 395 affiliated schools have an enrollment of 176,000 students, which amounts to an average enrollment of well over 400 students. There can be no doubt that all, or the vast majority, of SISA schools, like petitioners and like the schools affiliated with amici curiae, while private in the non-governmental sense, are clearly *not* private in the latter sense.

The only other principal issue in these cases is whether Section 1981 was properly applied below to prohibit a refusal, because of race, to admit black persons to petitioner private schools. Amici curiae submit that this application was clearly correct, that it was required by prior decisions of this Court and that it is consistent with a growing body of federal cases applying Section 1981 in accord with the statement by this Court (describing the Act of Congress in which Section 1981 first appeared) that it "meant exactly what it said". *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 (1968).

That Section 1981 reaches beyond state action and operates upon the unofficial acts of private individuals has been settled beyond question by this Court, in *Jones v. Alfred H. Mayer Co., supra, Tillman v. Wheaton Haven Recreational Association, Inc.*, 410 U.S. 431 (1973), and *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969).[3] This Court has also recently expressed its approval of the application of Section 1981 to prohibit private racial discrimination in employment. *Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975). In addition to the many cases applying the statute to contractual employment relationships, including those cited by the Court in *Johnson*, Section 1981 has been applied by the lower federal courts to other contractual relationships, including admission to a privately owned amusement park, *Scott v. Young*, 421 F.2d 143 (4th Cir. 1970), cert. denied, 398 U.S. 929 (1970); the right to purchase an accident insurance policy, *Sims v. Order of United Commercial Travelers of*

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[3] While the holdings in *Jones* and *Sullivan* involved 42 U.S.C. § 1982, this Court said in *Tillman* that since both sections derived from the same statute, the Civil Rights Act of 1866, they should receive similar interpretations. See 410 U.S. at 439-440.

America, 343 F. Supp. 112 (D. Mass. 1972); and the right to admission to a privately owned trade school, *Grier v. Specialized Skills, Inc.*, 326 F. Supp. 856 (W.D.N.C. 1971). Petitioner SISA argues that since a contract requires the assent of both parties, no white person has a "right" to contract to attend a private school, and therefore a black person denied admission because of race is not denied a right "to make and enforce" a contract protected by Section 1981. The fact is that a black person who is excluded because of race is, as the court below observed (A. 13), "denied a contractual right which would have been granted to him if he had been white", and such a contractual right must be held a right protected by Section 1981 or the statute becomes a nullity.

There is nothing before this Court which would warrant treating the school contracts in these cases in any different manner than the contracts in those cases in which Section 1981 has already been applied, unless to do so would impinge upon a right guaranteed by the Constitution. For the reasons set forth in the following argument, amici curiae contend that no such violation of constitutional rights is involved.

ARGUMENT

APPLICATION OF 42 U.S.C. §1981 SO AS TO PROHIBIT REJECTION BY PETITIONER SCHOOLS OF RESPONDENT CHILDREN BECAUSE OF THEIR RACE DOES NOT VIOLATE ANY CONSTITUTIONAL RIGHTS OF THE SCHOOLS, CHILDREN WHO ATTEND THEM, THEIR PARENTS, OR PRIVATE SCHOOLS GENERALLY.

The constitutional right of private schools to exist, and of parents to send their children to attend them rather than attending public schools, was clearly decided by this Court some fifty years ago, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and reaffirmed frequently since then, most recently in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). As associations of private schools, amici curiae look upon *Pierce* and its progeny as establishing a "bill of rights" for private schools, and as rightfully recognizing the unique and important role of private schools in our system and the contribution which they make to American education. Accordingly, amici curiae would be the last to question the validity or the vitality of these cases. But, as pointed out by the Chief Justice in *Norwood v. Harrison*, 413 U.S. 455 (1973), a case upon which petitioners rely heavily, "the Court's holding in Pierce is not without limits", and (quoting from Mr. Justice White in *Yoder*) "*Pierce* 'held simply that while a State may posit [educational] standards, it may not pre-empt the educational process by requiring children to attend public schools' ", 413 U.S. at 461. Thus, while *Pierce* and *Yoder* establish very clearly the right of private schools to exist, they do not establish any right of private schools to be free from reasonable legislative regulation.

Private schools have been held subject to regulations concerning their educational adequacy, failing which attendance at the private school is held not a defense to an action under a state compulsory attendance law. See, for example, *State v. Superior Court*, 55 W. 2d 177, 346 P. 2d 999 (1959), cert. denied sub. nom. *Wold v. Shoreline School District*, 363 U.S. 814 (1960); *Meyerkorth v. State*, 173 Neb. 889, 115 N.W. 2d 585 (1962). And private schools, like many other private institutions, are subject to reasonable regulation by state or federal government in furtherance of legitimate legislative purposes and provided that constitutional rights are not violated. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Farrington v. Tokushige*, 11 F.2d 710 (9th Cir. 1926), *aff'd* 273 U.S. 284 (1927); *Zucht v. King*, 260 U.S. 174 (1922); *State v. Williams*, 253 N.C. 337, 117 S.E. 2d 444 (1960).

There being no doubt that Section 1981 was validly enacted by Congress under authority of the Thirteenth Amendment, *Tillman v. Wheaton Haven Recreational Association, Inc., supra*, there is no question in this case as to the legitimate legislative purpose of this statute. Accordingly, the only question is whether the statute as applied below violates a recognized constitutional right.

In order for this Court to consider this issue, it must first consider precisely how Section 1981 affects private schools. And in view of some of the extravagant assertions of petitioners concerning the impact of the law, it will be helpful to approach this issue in terms of what Section 1981 does *not* do, as well as in terms of what it *does* do. Since the effect upon petitioners is also the effect upon our affiliates, amici curiae have a particular

interest in a clear understanding of the limitations of this law.

In the first place, it is clear that the statute in no way prohibits the right to teach unpopular theories concerning race, concerning the value or the harm of racial segregation, or concerning anything else. Any suggestion to the contrary is without foundation. Amici curiae, some of whose affiliates represent groups which historically have been minorities in one country or another and at one time or another, are as sensitive as anyone, and perhaps more than most, to the importance of freedom of thought and freedom to teach, particularly where the education of young people is involved. Amici curiae would resist any effort on the part of government to control thought processes and teaching in their schools and elsewhere, and would be among the first to challenge any law which had such an effect, whether the limitation was directed to beliefs which they found compatible, or, as would be the case with the beliefs espoused by SISA in its brief in this Court, ones with which they are in sharp disagreement. But amici curiae support the decision below without reservation because it is clear from the wording of Section 1981 and from the decision that the freedom to teach or speak about ideas or theories, *any* ideas or theories, is in no way limited by this statute as here applied.

Secondly, the statute as applied below places no limitation on the simple right to associate in private for educational or any other purposes. The only issue at stake in these cases is the applicability of Section 1981 to schools which solicit students from the general public and which are concededly open to all qualified white persons but closed to all black persons, no matter how highly qualified.

While a court may some day have to decide the constitutional bounds of Section 1981, if it is ever sought to be applied to strictly private activity,[4] that issue is not before the Court in this case.

Thirdly, while Section 1981 prohibits one criterion for admission to a private school, namely the race of the applicant, it places no limitation on any other criteria which a private school may choose to use, whether of a kind generally used by private schools, such as test performance, geographic location, ability to pay, willingness to abide by rules and regulations, etc., or whether, for that matter, of a kind *not* generally used by private schools, even a kind which could be considered arbitrary or unrelated to the usual purposes of private schools.

Fourthly, Section 1981 places no limitation on the right of a private school to concentrate its curriculum in such a way as to appeal to a particular religious or nationality group, or any other group and to seek applications from a particular segment of the population which might be expected to want that kind of particularized education. If schools which belong to SISA, for example, wished to concentrate their curriculum on studies in furtherance of their particular point of view, and to solicit students who might have a special interest in such studies, Section 1981 would not restrict such activity so long as the contract of admission was not denied to a black person who might wish to attend.

In short, the single effect of Section 1981 upon petitioner schools or upon any private school is to prohibit a refusal to admit a student solely because he or she is

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[4] See Footnote 2 *supra*.

black. With that in mind, we turn to petitioners' contention that this single limitation on their freedom of action is in violation of the Constitution.

The fact that Section 1981 places no limitations whatever upon the rights of free speech and free expression distinguishes this case from most of those upon which petitioners rely. Application of Section 1981 so as to prohibit racial discrimination by a private school does not involve a state enforced punishment because of one's beliefs or associations, as was so in cases cited by SISA, *United States v. Robel*, 389 U.S. 258 (1967), *Murray v. Jamison*, 333 F. Supp. 1379 (W.D.N.C. 1971), and *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (denial of employment), *Schneiderman v. United States*, 320 U.S. 118 (1943) and *United States v. Korner*, 56 F. Supp. 242 (S.D. Cal. 1944) (revocation of naturalization), *Schneider v. Smith*, 390 U.S. 17 (1968) (denial of a license), *Bond v. Floyd*, 385 U.S. 116 (1966) (denial of right of elected official to take a seat in the state legislature to which he was elected), *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958) (public disclosure of membership in an association of minority advocates, where this Court found that such disclosure was "likely to affect adversely the ability of [the association]and its members to pursue their collective effort to foster beliefs which they admittedly have a right to advocate", 357 U.S. at 462-463).

Whether or not there is a constitutionally-protected right of association which does not involve a right of free speech or expression or the advocacy of beliefs, there is no basis for the assertion of such a right in these cases. There is nothing in the record to indicate that petitioner schools involve any kind of "association" at all, at least as that term is normally understood. They are more properly viewed as institutions performing a quasi-public func-

tion, not established by the parents of children attending them, but established and operated by others, and which solicit their clientele much like any commercial enterprise, rather than having been formed by their membership.[5] The dissenting opinion in the court below suggests that the protection of Section 1981 should be limited to "secondary relationships", and that the statute should not be applied to "primary relationships". Even if such a distinction has a proper basis in the Constitution, which we question, amici curiae submit that the facts in the record place petitioner schools clearly beyond the scope of "primary relationships", which are defined as "basically relationships between friends, characterized by intimate association".[6] Schools which solicit students from the general public, by way of newspaper and "yellow page" advertisements, can hardly be referred to an involving relationships between friends or as "intimate." They involve no more "plan or purpose of exclusiveness" than did the discriminating organizations in *Sullivan v. Little*

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[5] The average size of the SISA schools (over 400) strongly suggests that they are similar to petitioner schools in these respects. See footnote 2 *supra.*

[6] The distinction between "primary" and "secondary" relationships is attributed in the dissenting opinion below to a comment, *Segregation in Private Schools*, 122 U. Penna L. Rev. 471, at 478, 479 (1973). The Comment, in turn, attributes the concept to Sengstrocks, *Discrimination: A Constitutional Dilemma*, 9 Wm. & Mary L. Rev. 59, 117 (1968). It appears from the Sengstrocks article that the concept was originated by the sociologist, Charles Cooley, in his *Social Organization* (1909), and the examples of "primary relationships" given by Sengstrocks are those which one has "with his spouse, his closest friends, his parents, and perhaps his siblings". 9 Wm. & Mary L. Rev. at 117. Clearly no such relationship is involved between a school and its students.

Hunting Park, supra, or *Tillman v. Wheaton Haven Recreational Association, Inc., supra.* See 396 U.S. at 236, and 410 U.S. at 438. The majority decision below properly characterized petitioner schools as

> "private only in the sense that they are managed by private persons and they are not recipients of public funds. Their actual and potential constituency, however, is more public than private". (A. 17)[7]

Nor can petitioner schools bring themselves within the scope of a constitutionally protected right of privacy such as that involved in *Griswold v. Connecticut,* 381 U.S. 479 (1965), where the Court afforded constitutional pro-

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[7] Petitioner, SISA, argues (pp. 12-14 in the brief in No. 75-278) that this Court has thrice held that SISA's member schools "constitute a permissible expression of the parents' freedom of association", relying on *Norwood v. Harrison,* 413 U.S. 455 (1973), *Gilmore v. City of Montgomery,* 417 U.S. 556 (1964) and *Coit v. Green,* 404 U.S. 997 (1971), affirming *Green v. Connally,* 330 F. Supp. 1150 (D.D.C. 1971). SISA's contention that this issue was "necessarily decided by this Court" in those cases, it totally erroneous. The most that can be said is that the three decisions assume that the discriminatory policies of SISA schools do not in themselves violate the constitutional rights of anyone. The issue before this Court in this case, however, is whether SISA's discriminatory policies are immune from the legislative prohibition on discrimination found in Section 1981. This issue was not involved in any way in *Norwood, Gilmore* or *Green.* Indeed, in *Green,* the District Court, after referring to the interest of a state in preventing racial discrimination, indicated that "whether such a state interest is sufficiently compelling to justify outright prohibition of racial discrimination in education by private or public schools . . . is a matter we are not called upon to determine in this case". 330 F. Supp. at 1168.

tection to the unique, intensely personal and intimate relationship of the partners to a marriage. The marriage relationship derives from state action, and it could hardly be contended that the relationship is free from any legislative regulation. But the regulation in that case, a prohibition on the use of contraceptives, clearly went to the heart of the most personal and private aspect of the marriage relationship – indeed, as this Court found, the regulation had a "maximum destructive impact" on that relationship, 381 U.S. at 485. No such intimate relationship and no such destructive impact is involved here.

The right to associate for the purpose of free speech or political advocacy, and the intimate and very private association of the marriage relationship, are clearly distinguishable from the right to operate a school which seeks students from the general public. And a legislative limitation which affects the right to operate such a school in but one respect, i.e., prohibiting the exclusion of one class of citizens, is clearly distinguishable from legislative limitations, such as those in *Griswold*, which significantly impaired the association or relationship found to be entitled to constitutional protection.

In the final analysis, the constitutional right asserted by petitioners comes to nothing more than the right of schools to practice racial discrimination, and (assuming that petitioner schools and SISA have standing to raise it) the right on the part of students to attend all-white classes. Amici curiae submit that a prohibition of the "right" to discriminate against black persons because of their race cannot be considered a fundamental deprivation of the right to associate as a private school. Amici curiae, and the schools affiliated with them, have demonstrated by their own actions that they do not consider the right to

discriminate against black persons, or, for that matter, the right to discriminate against any particular group, as essential to any legitimate rights of private schools. Indeed, they consider that discrimination in schools, both private and public, has been detrimental to, rather than supportive of, what they regard as the proper goals of private education in America.

Thus, the principle of nondiscrimination on the grounds of race is not only one to which the organizations affiliated with amici curiae subscribe, but it is a stated principle adopted by all members of the Council for American Private Education; it is a stated principle which is a requirement for all members of the Southern Association of Independent Schools, notwithstanding the location of such schools in the same area of the country as the schools which are affiliated with SISA; and it is a stated principle which is a requirement for all schools affiliated with the National Association of Independent Schools. Moreover, a number of affiliates of amici curiae, recognizing the legacy of slavery and of the discrimination practices against blacks in this country since slavery, in the field of education, both public and private, as well as in other areas, have adopted or supported various programs seeking not only the implementation of policies of nondiscrimination, but affirmative action programs designed to create educational opportunities for minority students, particularly black students.[8] Amici curiae do not make these repre-

[8] Some examples of these principles and programs are as follows:

– An applicant for admission to the National Association of Independent Schools must submit a statement "that the school's policies provide for admission of students & employment of personnel without regard to race or color (if not contained in the school catalogue)";

(Continued)

sentations to the Court for the purpose of exhibiting a "holier than thou" attitude, or to flaunt obedience to what the courts below have held to be the law of the land. They do so, rather, to demonstrate that the application of Section 1981 to private schools is in harmony with, not in opposition to, the policies and practices of a very large number of private schools, and that depriving private schools of the "right" to discrminate against black persons does not deprive them of any right which is essential to their operations or to the principles of their independence which they hold dear.

Amici curiae submit that the language from this Court's decision in *Norwood v. Harrison*, relied upon by petitioners to support their claim of a constitutional right to discriminate, in fact demonstrates its invalidity:

> "In contrast, although the Constitution does not proscribe private bias, it places no value

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[8](Continued)

- NAIS or its affiliates have supported such outreach programs as A Better Chance, Inc., Broad Jump, Inc., the Independent Schools Opportunity Project, the Black Student Fund, the Supplementary Program of Hartford in Education Reinforcement and Enrichment, the Minority Teacher Recruitment Program;
- A policy of admission without regard to race or color was urged upon its affiliates by the Southern Association of Independent Schools in 1969, and became a requirement for admission to the Association in 1971;
- The constitution of the National Association of Episcopal Schools, Inc. states, paragraph 2, that a school eligible for voting membership in the Association shall be one "whose admission policies do not exclude any candidate on the basis of race or color".

> on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, *but it has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under Sec. 2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts".* 413 U.S. at 469-470 (emphasis added).

The positive constitutional importance of anti-discrimination laws was characterized by the Court in *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), aff'd sub. nom. *Coit v. Green*, 404 U.S. 997 (1971), in the following language:

> "There is a compelling as well as a reasonable government interest in the interdiction of racial discrimination which stands on highest constitutional ground, taking into account the provisions and penumbra of the Amendments passed in the wake of the Civil War. That governmental interest is dominant over other constitutional interests to the extent that there is a complete and unavoidable conflict." 330 F. Supp. at 1167.

The "right" to attend a segregated school should have no more claim to constitutional protection than the "right" to live in an apartment building which refuses to admit

black tenants, or the "right" to work at a factory which refuses to employ black workers or the "right" to stay in a hotel or eat in a restaurant which refuses to serve black customers.

Even if Section 1981 as applied below involved some impingement upon a constitutionally recognized right of association, this Court would nevertheless have to weigh the impact of that impingement against the substantiality of the reasons advanced in support of the law. See *United States v. Robel*, 389 U.S. 258, 264-5 (1967); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 463 (1958); *Schneider v. State of New Jersey*, 308 U.S. 147, 161 (1939).

In a footnote to the passage from *Norwood v. Harrison* quoted on pp. 18, 19 *supra*, the Chief Justice cited *Griffin v. Breckenridge*, 403 U.S. 88 (1971), *Jones v. Alfred H. Mayer Co.*, *supra*, the federal public accommodations law (42 U.S.C. §2000a et. seq.), the federal law against discrimination in employment (42 U.S.C. §2000e et. seq.) and the federal fair housing law (42 U.S.C. §3601 et. seq.) as examples of remedial legislation against discrimination and cases thereunder, 413 U.S. at 470. When federal laws which protect the rights of black persons against private racial discrimination have been contested in the courts, frequently in the face of arguments similar to petitioners', that they impinge impermissibly upon the rights of those charged with discrimination, they have been uniformly upheld, in the cases cited by the Chief Justice and in others such as *Tillman v. Wheaton-Haven Recreational Association, Inc.*, *supra*, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), *District of Columbia v. Thompson Co.*, 346 U.S. 100 (1953), *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972), *cert. denied*, 409 U.S. 934 (1972).

While the Court has interpreted the Constitution as providing the maximum freedom from unnecessary or unreasonable governmental limitations on private activity, it has recognized that the minimal limitations on private activity which are imposed by anti-discrimination laws are clearly justified by the overriding necessity to take meaningful steps to eliminate the discriminatory practices which have caused such hardship to so many for so long.

CONCLUSION

For the reasons set forth above, in addition to the reasons set forth in respondents' brief, amici curiae ask that the decision of the Court below be affirmed.

Respectfully submitted

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IN THE

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OCTOBER TERM, 1975

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and

BRIEF AMICUS CURIAE

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TABLE OF CONTENTS

Page

MOTION OF THE NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE 1

BRIEF AMICUS CURIAE OF THE NATIONAL EDUCATION ASSOCIATION 5

INTEREST OF AMICUS CURIAE 5

SUMMARY OF ARGUMENT 7

ARGUMENT

I. Segregation Academies Undermine Public School Desegregation by Indoctrinating Hundreds of Thousands of White Children to Believe in Their Own Racial Superiority 8

II. Segregation Academies Tangibly Injure the Public Schools by Draining Their Resources and Directly Competing for Their Constituencies 13

III. Because of the Public Impact of Racially Exclusionary Segregation Academies, This Court Should Hold that They Are Within the Reach of 42 U.S.C. § 1981 17

CONCLUSION 18

APPENDIX 19

TABLE OF AUTHORITIES

Cases: Page

Alexander v. Holmes County Bd. of Educ.,
396 U.S. 19 (1969) 3, 6

Brown v. Board of Education,
347 U.S. 483 (1954) 15

Franklin v. Quitman County School Bd. of Education,
288 F. Supp. 509 (N.D. Miss. 1968) 14

Gilmore v. City of Montgomery,
417 U.S. 556 (1974) 17

Green v. Connally,
330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971) 16

Green v. New Kent County School Bd.,
391 U.S. 430 (1968) 8

Jones v. Alfred H. Mayer Co.,
392 U.S. 409 (1968) 17

Keyes v. School Dist. No. 1, Denver,
413 U.S. 189 (1973) 3, 6

Miliken v. Bradley,
418 U.S. 717 (1974) 3, 6

Moose Lodge No. 107 v. Irvis,
407 U.S. 163 (1972) 17

Norwood v. Harrison,
413 U.S. 455 (1973) 16, 17

Pasadena County Bd. of Educ. v. Spangler,
No. 75-164 (O.T. 1975) 3, 6

Pierce v. Society of the Sisters,
268 U.S. 510 (1925) 17

Page

Poindexter v. Louisiana Fin. Assistance Comm'n,
275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968) 12

School Bd. of the City of Richman, Va. v. State Bd.,
412 U.S. 92 (1973) 3, 6

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969) 17

Swann v. Board of Education,
402 U.S. 1 (1971) 8

Swann v. Charlotte-Mecklenburg Bd. of Educ.,
402 U.S. 1 (1971) 3, 6

Tilman v. Wheaton-Haven Recreational Ass'n,
410 U.S. 431 (1973) 17

United States v. Hinds County School Bd.,
433 F.2d 605 (5th Cir. 1970) 14

Wallace v. United States,
389 U.S. 215 (1967), *aff'g Lee v. Macon County Bd. of Education*, 267 F. Supp. 458 (M.D. Ala. 1967) 12

Wisconsin v. Yoder,
406 U.S. 205 (1972) 17

Statutes:

42 U.S.C. § 1981 . . . . . 7, 8, 18

Alabama Code tit. 52, § 207(2) (Supp. 1971) 14

Georgia Code Ann. ch. 32-6 (1969) 14

Mississippi Code Ann. §§ 6248-01 to 6248-26 (Supp. 1972) 14

Page

Miscellaneous:

Hearings Before the Select Senate Committee on Equal Educational Opportunity, 91st Cong., 2d Sess. (1970) ..... *passim*

Bunting, PRIVATE INDEPENDENT SCHOOLS: THE AMERICAN PRIVATE SCHOOLS FOR BOYS AND GIRLS: A DIRECTORY AND GUIDE FOR PARENTS AND TEACHERS (1969) 9

J. Palmer, THE IMPACT OF PRIVATE EDUCATION IN THE RURAL SOUTH (1974) 9, 11, 12, 15

Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449 (1974). 3, 7

Note, Desegregation of Private Schools: Section 1981 as an Alternative to State Action, 62 Geo. L.J. 1363 (1974) 3, 7

Recent Decisions, 45 Miss. L.J. 246 (1974) 3, 7

Recent Cases, 42 U. Cin. L. Rev. 767 (1973) 3, 7

Comment, Jones v. Alfred H. Mayer Co. Extended to Private Education: Gonzales v. Fairfax-Brewster School, Inc., 122 U. Pa. L. Rev. 471 (1973) 3, 7

Recent Decisions, 8 U. Rich. L. Rev. 285 (1974) 3, 7

Recent Cases, 26 Vand. L. Rev. 1307 (1973) 3, 7

Note, Segregation Academies and State Action, 82 Yale L.J. 1436 (1973) ..... *passim*

Page

J. Walton & A. Cleveland, *The South's New Segregation Academies*. Phi Delta Kappan, December, 1971, at 234 11

Time, December 15, 1975 at 54 10

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MOTION OF THE NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The National Education Association (NEA) hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief amicus curiae on the merits in the above entitled cause. Respondents and certain petitioners have consented to the filing of the attached brief.

but other petitioners have withheld their consent. Accordingly, NEA seeks leave of the Court to file its brief.

The National Education Association is an independent, voluntary organization of educators open to any person who is actively engaged in the profession of teaching or other educational work, or any other person interested in advancing the cause of education. It presently has approximately one million seven hundred thousand regular members, and is the largest professional organization in the nation. NEA was first organized in 1857 and was chartered by a special act of Congress in 1906. Its statutory purpose is

> "to elevate the character and advance the interests of the profession of teaching, and to promote the cause of education in the United States." (34 Stat. 805.)

The overall policies of NEA are determined by its Representative Assembly, a body composed of approximately 7,000 delegates representing affiliated local and state education associations.

A major interest of NEA is to secure equality of education and sound education for children of all races. It is convinced that segregated education is not only inherently unequal but adversely affects the quality of education afforded to all students, not least by denying them adequate preparation for living and working in a society in which they must deal with persons not of their own race.

NEA has followed developments in the "segregation academy" movement, has testified to the Senate Select Committee on Equal Educational Opportunity[1] concerning

[1] Hearings Before the Select Senate Committee on Equal Educational Opportunity, 91st Cong. 2d Sess., chaired by Senator Mondale (1970).

school desegregation,[2] and has reviewed the reports on the segregation academies in the general press and in the educational[3] and legal literature.[4] As discussed more fully in the attached brief, NEA is convinced that "segregation academies" adversely affect public school desegregation and public education in this nation, and believes that its views, and the facts set forth in the attached brief, will be of assistance to this Court.

[2] NEA and its state affiliates have participated as amicus curiae in other major proceedings involving issues of school desegregation. *See Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189 (1793); *School Bd. of the City of Richmond, Va. v. State Bd.*, 412 U.S. 92 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Milliken v. Bradley*, 418 U.S. 717 (1974); and *Pasadena City Bd. of Educ. v. Spangler*, No. 75-164 (O.T. 1975).

[3] A selection of writings on the segregation academy movement is set forth in the Appendix to the accompanying brief.

[4] *See*, Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449 (1974); Note, Desegregation of Private Schools: Section 1981 as an Alternative to State Action, 62 Geo. L.J. 1363 (1974); Note, Segregation Academies and State Action, 82 Yale L.J. 1436 (1973); Comment, Jones v. Alfred H. Mayer Co. Extended to Private Education: Gonzales v. Fairfax-Brewster School, Inc., 122 U. Pa. L. Rev. 471 (1973); Recent Decisions, 45 Miss. L.J. 246 (1974); Recent Decisions, 8 U. Rich. L. Rev. 285 (1974); Recent Cases, 42 U. Cin. L. Rev. 767 (1973); Recent Cases, 26 Vand. L. Rev. 1307 (1973).

Wherefore, the National Education Association requests that this Court grant leave to file the accompanying brief amicus curiae in support of the decision below.

Respectfully submitted,

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The National Education Association is an independent, voluntary organization of educators open to any person who is actively engaged in the profession of teaching or other educational work, or any other person interested in advancing the cause of education. It presently has approximately one million seven hundred thousand regular members, and is the largest professional organization in the nation. NEA was first organized in 1857 and was chartered by a special act of Congress in 1906. Its statutory purpose is

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The overall policies of NEA are determined by its Representative Assembly, a body composed of approximately 7,000 delegates representing affiliated local and state education associations.

A major interest of NEA is to secure equality of education for children of all races. It is convinced that segregated education is not only inherently unequal but adversely affects the quality of education afforded to all students, not least by denying them adequate preparation for living and working in a society in which they must deal with persons not of their own race.

NEA has followed developments in the "segregation academy" movement, has testified to the Senate Select Committee on Equal Educational Opportunity[1] concerning school desegregation,[2] and has reviewed the reports on the segregation academies in the general press and in the

[1] Hearings Before the Select Senate Committee on Equal Educational Opportunity, 91st Cong. 2d Sess., chaired by Senator Mondale (1970) (hereinafter "Mondale Hearings") at 995-1169. The record of the Mondale Hearings is an important compendium of data on the segregation academy movement.

[2] NEA and its state affiliates have participated as amicus curiae in other major proceedings involving issues of school desegration. *See Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189 (1973); *School Bd. of the City of Richmond, Va. v. State Bd.*, 412 U.S. 92 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Milliken v. Bradley*, 418 U.S. 717 (1974); and *Pasadena City Bd. of Educ. v. Spangler*, No. 75-164 (O.T. 1975).

educational[3] and legal literature.[4] As discussed more fully herein, NEA is convinced that "segregation academies" adversely affect public school desegregation and public education in this nation, and believes that its views, and the facts set forth herein will be of assistance to this Court.

SUMMARY OF ARGUMENT

This case presents a single issue: does 42 U.S.C. §1981[5] prohibit private schools from denying admission to qualified black applicants solely on the basis of their race?

Since *Brown v. Board of Education*, 374 U.S. 483 (1954), hundreds of racially segregated private schools, commonly known as "segregation academies," have been established, and hundreds are in operation today. This development of new segregated school systems undermines this Court's efforts "to eliminate dual systems and establish unitary systems" for the nation's elementary and secondary

[3] A selection of writings on the segregation academy movement is set forth in the Appendix.

[4] *See*, Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449 (1974); Note, Desegregation of Private Schools: Section 1981 as an Alternative to State Action, 62 Geo. L.J. 1363 (1974); Note, Segregation Academies and State Action, 82 Yale L.J. 1436 (1973) (hereinafter "Segregation Academies"); Comment, Jones v. Alfred H. Mayer Co. Extended to Private Education: Gonzales v. Fairfax-Brewster School, Inc. 122 U. Pa. L. Rev. 471 (1973); Recent Decisions, 45 Miss. L.J. 246 (1974); Recent Decisions, 8 U. Rich. L. Rev. 285 (1974); Recent Cases, 42 U. Cin. L. Rev. 767 (1973); Recent Cases, 26 Vand. L. Rev. 1307 (1973).

[5] "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

schools. *Swann v. Board of Education*, 402 U.S. 1, 6 (1971). By indoctrinating hundreds of thousands of school children — including future community leaders — to believe in racial segregation, segregation academies stimulate and reinforce community attitudes that can only be inimical to effective public school desegregation. Moreover, segregation academies have undercut public school desegregation by siphoning off white students, and by draining scarce resources and community commitment away from public school systems. This Court should not allow these institutions to fulfill the ignoble purpose for which they were created — namely, to permit white parents, faced with public school desegregation, to send their children to schools which exclude black children. Because of the public impact of racially-segregated private schools, this Court should hold that 42 U.S.C. § 1981, which guarantees black citizens the right to make and enforce contracts on the same basis as white citizens, should encompass the right of otherwise qualified black students to attend the academies and other private schools without exclusion solely on the basis of their race.

ARGUMENT

I. Segregation Academies Undermine Public School Desegregation By Indoctrinating Hundreds of Thousands of White Children to Believe in Their Racial Superiority.

The segregation academy movement in the South took its impetus from this Court's *Brown* decision in 1954, and began to accelerate rapidly following the passage of the Civil Rights Act of 1964 and this Court's decision in *Green v. New Kent County School Board*, 391 U.S. 430 (1968). In 1970 testimony before the Senate Select Committee on Equal Education Opportunity, the Director of the Southern Regional Council's Leadership Project estimated that enrollment in the academies at that time was "as much as ten times as great as before

passage of the Civil Rights Act of 1964."[6] In the eleven-state South, with a 1970 public school enrollment of about 11,700,000 students, approximately 400,000 then attended private schools.[7] While a few of those students attended the older "independent" private schools,[8] the vast majority attended the newer academies founded in the wake of public school desegregation. Thus, in Alabama, Florida, Louisiana, Mississippi and the Carolinas, the number of private schools more than doubled between 1954 and 1967, and some 168 new private schools opened in those states between 1964 (when the Civil Rights Act became law) and 1967.[9] Evidence of the racial

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[6] Mondale Hearings at 1932.

[7] *Id.* at 1931-32. Another commentator estimated that two years later, about 535,000 students were enrolled in the academies, an increase from about 25,000 in 1966. *Segregation Academies, supra*, 82 Yale L.J. at 1441 (1973) (hereinafter "Segregation Academies"). In a recent press report, it was estimated that "some 3,500 of these schools now operate in the South with a total enrollment of 750,000, or 10% of the region's white school children." *Time*, December 15, 1975, at 54.

[8] The South has not had a strong tradition of "private" or "independent" college preparatory schools such as serve affluent groups in the Northeast and elsewhere. Outside of Virginia, few college preparatory schools existed in the South during the first half of the century (J. PALMER, THE IMPACT OF PRIVATE EDUCATION IN THE RURAL SOUTH (1974) (in NEA library)), and only 40 of the nation's 1,000 independent schools are located in the South, with half that number in Virginia and Florida. *See* BUNTING, PRIVATE INDEPENDENT SCHOOLS: THE AMERICAN PRIVATE SCHOOLS FOR BOYS AND GIRLS: A DIRECTORY AND GUIDE FOR PARENTS AND TEACHERS (1969). Children of affluent white parents in the South have tended to attend public schools. Only in Louisiana, where a relatively large Catholic population has supported an extensive parochial school system, have non-public schools been a significant factor.

[9] Mondale Hearings at 1932. See *Segregation Academies, supra* at 1448 (including the report that the Southern Independent School Association claimed to represent 396 academies, with enrollments of 176,000 students, in 1971), and the *Time* report, n.7, *supra*, for more recent estimates. Hard statistical data on the schools and their enrollments is difficult to obtain. *Palmer, supra* at 12.

purpose for this growth may be found in the active support given the academies by the segregationist "Citizens Council" movement. On September 16, 1964, the Citizens Council's official publication, "The Citizen," published an article entitled "How to Start a Private School" and prefaced it thus:

> "The revolutionary attempt to force racial integration on the United States is the immediate occasion for a sudden new interest in private schools . . . ."[10]

The Councils later reissued information about the formation of academies. (*Id.*) That the views attributed to the Citizens Council are not those of the "independent" (*i.e.*, non-segregationist) private schools in the region may be seen in the remarks of the president of Atlanta's independent Westminster School made in 1969 to a group of independent school representatives in South Carolina:

> " . . . Boys and girls today must be trained for life in a world different from the one you and I have known. Surely, theirs will be a world in which distinctions in races and creed are minimized. Frankly, our children must learn to appreciate and live with black boys and girls."[11]

Yet the segregation academies have provided no opportunity for children of different races to learn to live together; rather, they have provided an opportunity for continued compartmentalization of the races. Though many may not do as reported of some South Carolina academies and give graduating seniors "survivor pins" with a Confederate flag with the word "Survivor" engraved on them,[12] all segregation academies clearly serve as weapons for those who oppose desegregation of our nation's schools.

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[10] Mondale Hearings at 1933.

[11] *Id.* at 1938.

[12] *Id.* at 1943.

In that sense, they undercut effective public school desegregation. One commentary has referred to "the debilitating psychological and sociological consequences, both to individuals and to local communities, of having thousands of young people isolated from the facts of racial heterogenity and democracy."[13] If private, all-white academies should be permitted to continue as bastions of racial exclusion, students will be deprived of the experience needed to operate, as the head of Atlanta's Westminster School said, "in a world in which distinctions of races and creed are minimized." But in fact, the academies communicate precisely the opposite message. As one witness before the Mondale hearings testified:

> "[T]heir presence in schools founded upon racial discrimination and supported to a large extent by people antagonistic towards the country's progress in civil rights (and, frequently, simply antagonistic towards the Constitutional, and toward the Christian precepts that many of the schools claim to embrace) inevitably must be a factor in what the children absorb."[14]

Another witness[15] testified that "white children know that their parents send them to the segregationist academies so they won't have to go to school with black children." She stated that the very existence of the schools sends a clear message to the students that "[y]ou are here because you are white and that is better than being black and we the adults of this community, your parents and teachers and churches, believe this doctrine and you should too." In

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[13] J. Waldon & A. Cleveland, *The South's New Segregation Academies*, Phi Delta Kappan, Dec. 1971, at 234, 239.

[14] Testimony of Reese Cleghorn, Director of the Southern Regional Council's Leadership Project (Mondale Hearings at 1936).

[15] Testimony of Winifred Green on behalf of the American Friends Service Committee (Mondale Hearings at 1198).

short, as this Court recognized in *Norwood v. Harrison*, 413 U.S. 455, 469 (1973):

> "The private school that closes its doors to defined groups of students on the basis of constitutionally suspect criteria manifests by its own actions, that its educational processes are based on private belief that segregation is desirable in education. There is no reason to discriminate against students for reasons wholly unrelated to individual merit unless the artificial barriers are considered an essential part of the educational message to be communicated to the students who are admitted."

This Court has decided that it will not tolerate state support of deliberate racial exclusion in these schools.[16] But even without formal state support, private all-white, racially-exclusionary academies inevitably will reinforce attitudes of white racial superiority and — now and in the future — undermine community attitudes of racial tolerance and understanding vital to the effective desegregation of the public schools.

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[16] This Court's decision in *Norwood v. Harrison*, 413 U.S. 455 (1973), striking down a Mississippi statute giving free textbooks to all students, including those in private segregated schools, is one example of a refusal to allow state support of such discrimination. Others include this Court's decision in *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), holding that a city was properly enjoined from permitting exclusive access to its recreational facilities by segregated private schools and associated groups. See also the lower court decisions, affirmed by this Court, barring state tuition grants to children attending segregation academies. (*See, e.g., Poindexter v. Louisiana Fin. Assistance Comm'n*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968); *Wallace v. United States*, 389 U.S. 215 (1967), *aff'g per curiam, Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458, 475-78 (M.D. Ala. 1967).

II. Segregation Academies Tangibly Injure the Public Schools by Draining Their Resources and Directly Competing for Their Constituencies.

Segregation academies have injured the public schools in their communities in a variety of important tangible ways. These academies, which differ in significant respects from traditional private schools, have grown in number and strength to a degree that they deprive parallel public school systems:

> — of students, teachers and administrators in significant numbers,
> — of substantial federal, state and local financial support, and
> — of community support vital both for bond issues to finance capital improvements and modernization and for the democratic interchange necessary if our public schools are to remain alert and responsive to community needs and committed to high educational standards.

Segregation academies have drained from the public schools valuable resources. These include significant numbers of teachers, administrators, and students, in the case of teachers and administrators, many "crossed-over" to the academies on the eve of public school desegregation rather than teach all-black or even biracial classes, and such "cross-over" faculty became the nuclei around wich the new schools were organized.[17] Moreover, white withdrawal from public schools, which appears to be closely correlated with percentages of blacks enrolled in the public schools,[18] has lowered public sup-

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[17] See discussion at pp. 7-12, *supra;* Palmer, *supra*, at 17-18; *Segregation Academies, supra*, 82 Yale L.J. at 1452, n. 83.

[18] See *Segregation Academies, supra* at 1451, n. 81.

port for those schools. As state assistance to the segregation academies, such as tuition grants from state governments, has been declared unlawful, financial pressure on lower and middle class families who must bear tuition costs for children in segregation academies has forced reduction in local school taxes needed to support the public systems.[19] Indeed, some areas have experienced significant declines in retail sales activity and tax collections, and increases in personal bank loans to families with children in the academies.[20]

As white withdrawal has caused an increase in the proportion of blacks in public school systems, and as new "private" white systems have arisen alongside them, financial support for public schools has been reduced both automatically — because fewer students have been in attendance[21] — and as a result of decisions by state and local governments and by citizens. Thus, local electorates have refused to approve new school bond issues, and bond issues that were approved before public school desegregation have not been funded.[22] Other instances of lowered support for public schools have been local school districts' decisions to reduce school taxes (paid, *inter alia*, by parents of students in the academies) and to reduce expenditures.[23] These decisions have been particularly evident in predominantly

[19] See *id.* at 1445, n. 60 for details concerning reductions in local school taxes after massive white withdrawals from the public schools.

[20] Mondale Hearings at 1947-50.

[21] *See, e.g.*, Ala. Code tit. 52, § 207 (2) (Supp. 1971); Ga. Code Ann. ch. 32-6 (1969); Miss. Code Ann. §§ 6248-01 to 6248-26 (Supp. 1972). For a discussion of the interrelationship between state funds and federal funds under the Emergency School Assistance Act, see *Segregation Academies, supra*, at 1452, n. 86.

[22] *See, e.g., United States v. Hinds County School Bd.*, 433 F.2d 605, 609 (5th Cir. 1970); *Franklin v. Quitman County School Bd. of Educ.*, 288 F. Supp. 509 (N.D. Miss. 1968).

[23] *See, Segregation Academies, supra*, at pp. 1455, n. 60, and 1452-53, n. 87; Mondale Hearings at 1944.

black school systems controlled by white or white-dominated school boards.[24]

The tuition burdens placed on parents of students in segregation academies have, as noted above, restricted the availability of public school financing. In addition, the more affluent parents historically have provided social, politicial, and economic leadership in their communities, and have provided leadership to community participation in the public schools — participation that enables the professional educators, teachers and administrators to respond to changing social values. Engagement of community leaders with public schools also is essential to keep the schools committed to high educational standards. If community leadership exhibits indifference to the quality of instruction in its public schools, that quality may be expected to decline.

As community leaders send their children to segregation academies, this type of community stimulation to the public schools declines. Moreover, as indicated above, it is the children of these leaders who are most likely to assume positions of influence in future years, and to the extent that they are indoctrinated with invidious concepts of separation of the races, the policies embraced by the nation, at least since the *Brown* decision, will be undermined. Segregation academies symbolize the unwillingness of important segments of the white communities to work with the public schools and to ease the racial and social transitions represented by *Brown v. Board of Education* and the historic developments of the more than two decades that have followed that decision.

That the segregation academies are affected with a public interest is reflected not only in their adverse impact

[24] *Segregation Academies, supra* at 1453, n. 87. *See, also, Palmer, supra*, at 19, *et seq.*; Mondale Hearings at 1939.

on public school desegregation and upon the public schools, but also, as the court below held, because the "actual and potential" constituency of the segregation academies "is more public than private" (A. 17) and that "[t]hey appeal to the parents of all children in the area who can meet their academic and other admission requirements." (*Id.*) This constituency consists of a broad segment of the white public that formerly patronized the public schools. The quasi-public nature of the segregation academies is also reflected in the public benefits — federal, state and local — that they have received. These benefits have included federal tax exemptions, and state textbook support, free transportation of students, free (or inexpensive) use of public property and facilities, pay of teacher salaries and valuable encouragement from public officials.[25] It is true that federal tax exemptions to segregation academies have been barred following *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub. nom. Coit v. Green*, 404 U.S. 997 (1971) and state textbook support has been outlawed following *Norwood v. Harrison, supra.* But that assistance nevertheless enabled the academies initially to grow and prosper.

[25] Mondale Hearings at 1939-41. For testimony on public school salaries to private school teachers, *see id.* at 999, 1147, 1786-87, 1853, 1968, 1972. *See, Segregation Academies, supra*, 82 Yale L.J. at 1446-47, and accompanying notes 61-67, for examples of such assistance and citations to lawsuits in which it has been attacked. Of particular interest is note 67, detailing various "unofficial" means, including "voluntary" assessments on local businesses, bank loans at favorable rates, labor union assistance in establishment of academies, and bonuses from employers to meet tuition payments, by which the segregation academies have been supported.

III. Because of the Public Impact of Racially Exclusionary Segregation Academies, This Court Should Hold that They are Within the Reach of 42 U.S.C. § 1981.

To permit the segregation academies to continue to discriminate with respect to admission policies would represent a retreat from this Court's holdings in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); and *Tillman v. Wheaton-Haven Recreational Association*, 410 U.S. 431 (1973). The court below properly followed the teaching of those cases that 42 U.S.C. § 1981 prohibits racial discrimination in private contractual arrangements even without state involvement. While this Court in *Norwood v. Harrison, supra*, 413 U.S. at 463, indicated that "the Constitution may compel tolerance of private discrimination in some circumstances," that tolerance should not be extended to permitting segregation academies or other private schools to exclude qualified applicants solely because they are black. As this *amicus* has shown above, the impact of this segregation policy is significantly adverse to the interest of public education in the United States and undercuts the public school desegregation mandated by the *Brown* decision and subsequent decisions of this Court.

This Court's decisions in *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925) and more recently in *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) have long made it clear that the state's "paramount responsibility" to provide a public education may be "made to yield to the right of parents to provide an equivalent education in a privately operated system." But schools, whether public or private, perform a function quite distinct from purely private associations dealt with by this Court in the *Moose Lodge* and *Gilmore* cases.[26]

[26] *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Gilmore v. City of Montgomery, supra*, 417 U.S. at 572-75.

The impact, discussed above, of the segregation academies on the communities in which they operate and upon the public schools from which they have drawn away students and public support makes it particularly appropriate that they should now be held to be within the reach of 42 U.S.C. §1981. That statute, which guarantees to black citizens the right to make and enforce contracts on the same basis as white citizens, should be read by this Court, as it was below, to encompass the right of otherwise qualified black students to attend the academies, which presently, in the words of the court below (A. 15), "evidence 'no plan or purpose' of exclusiveness other than race."

CONCLUSION

For the reasons set forth above, as well as those set forth in Respondents' brief and the brief of the independent school *amici curiae*, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The undersigned, as counsel for the Anti-Defamation League of B'nai B'rith, American Jewish Committee, American Jewish Congress, the National Association for the Advancement of Colored People and the American Civil Liberties Union respectfully move this Court for leave to file the accompanying brief *Amici Curiae* in support of the position of Respondents requesting that this Court affirm the decision below that the discriminatory practices of defendants and intervenors herein are prohibited under 42 U.S.C. §1981.

Consent to file the attached brief has been sought from the parties, and all have granted such permission except

Russell L. Runyon, *et ux.*, and Fairfax-Brewster School, Inc. It is therefore necessary to request permission of this Court under Rule 42.

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.

The American Jewish Committee was founded in 1906, and likewise has among its major purposes that of advancing good will and broader understanding among all Americans.

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of American Jews through preservation of the rights of all Americans.

The National Association for the Advancement of Colored People is the largest national civil rights organization in this country. As such, it is vitally concerned with fundamental human rights and particularly with the constitutional rights of Black Americans.

The American Civil Liberties Union was founded in 1920 and is a national civil rights organization interested in the preservation of the civil liberties of all persons.

The *Amici* are among the leading civil rights and human relations agencies in the United States. Each of these or-

ganizations has filed numerous briefs *Amici* in this and other courts in the interest of securing the constitutional and statutory civil rights of all Americans. Each is national in scope and is able to address the issues raised on this appeal in the broad context of the unified national purpose to eradicate the scourge of racial discrimination. Each respectfully offers this Court its accumulated experience of the issues raised by this case.

The *Amici* seek to submit the accompanying brief because they believe this case presents to this Court a serious challenge to the attainment of meaningful school desegregation, a goal which cannot be fully achieved so long as private schools are permitted to reject students solely on the basis of race.

Respectfully submitted,

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Interest of the *Amici*	2
Statement of the Case	3
Summary of Argument	8
Argument	9
The admission practices of the defendant and intervenor schools violate 42 U.S.C. §1981	9
§1981 Proscribes Racial Discrimination by Private Persons in the Making and Enforcement of Contracts	10
§1981 Proscribes Racial Discrimination by Private Schools	13
The Application of §1981 to Private Schools Does Not Violate Petitioners' First Amendment Rights or Their Right of Privacy	15
The Decision Below Is Consistent With Prior Decisions of This Court Regarding Private Education	18
Conclusion	21

TABLE OF AUTHORITIES

PAGE

Cases:

Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) 16

Brady v. Bristol Myers, Inc., 459 F.2d 621 (8th Cir. 1972) 14
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Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972) 14
Buckley v. Valeo, 44 U.S.L.W. 4127 (January, 1976) 15

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Civil Rights Cases, 109 U.S. 3 (1883) 11
Coit v. Green, 404 U.S. 997 (1971) 19
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Healy v. James, 408 U.S. 169 (1972) 15
Hodges v. United States, 203 U.S. 1 (1906) 11
Hurd v. Hodge, 334 U.S. 24 (1948) 11, 12

PAGE

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) 8, 12, 13
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Stanley v. Georgia, 394 U.S. 557 (1969) 16
Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) 6, 12, 13
Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 16

PAGE

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Constitutional and Statutory Provisions:

First Amendment, U.S. Constitution 15
Thirteenth Amendment, U.S. Constitution 11, 20
Fourteenth Amendment, U.S. Constitution 11
28 U.S.C. §1254 (1) 1
42 U.S.C. §1981 ..... 2, 6, 7, 8, 10, 11, 12, 13, 14, 15
42 U.S.C. §1982 ..... 6, 7, 8, 10, 11, 12, 13, 14
Civil Rights Act of 1866, 14 Stat. 27 §1 ..... 8, 10, 11, 12, 13
Civil Rights Act of 1866, 14 Stat. 27 §2 ..... 8, 10, 11, 12, 14
Civil Rights Act of 1866, 14 Stat. 27 §14 ..... 8, 10, 11, 12
Civil Rights Act of 1866 (as reenacted 1870) 8
Civil Rights Act of 1964, 78 Stat. 241 15
Civil Rights Act of 1968, 82 Stat. 83 15
Idaho Code §§67-5902 (10); 67-5909 (6) (Burns 1973) 17
Indiana Ann. Stat. §§22-9-1-2 (a); 22-9-1-3 (1) (1974) 17
Mass. Ann. Laws ch. 151C, §1 (b) (Supp. 1974) 17

PAGE

Minn. Stat. Ann. §§363.01, subd. 20; 363.03, subd. 5 (Supp. 1974) 17
Mont. Rev. Codes Ann. §§64-305 (4); 64-306 (6) (Supp. 1974) 17
N.J.S.A. 10:5-5 (1) (Supp. 1974) 17
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S.D. Compiled Laws Ann. tit. 10, §2 (1966) 17
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Miscellaneous:

Cong. Globe, 39th Cong., 1st Sess. 474, 1151 (1866) 11
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Note, *Segregation Academies and State Action*, 82 Yale L.J. 1436 (1973) 10, 18
Note, *Section 1981 and Private Groups*, 84 Yale L.J. 1441 (1975) 16

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Opinions Below

The opinions of the Fourth Circuit Court of Appeals sitting *en banc* together with the opinion on rehearing are reprinted at 515 F.2d 1082. The opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division (Bryan, J.), is reported at 363 F. Supp. 1200.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether §1981 of Title 42 of the United States Code, derived from the Civil Rights Act of 1866, prohibits schools which receive no government financial aid from denying admission to qualified Black applicants solely on the basis of their race.

2. Whether the application of §1981 to schools which receive no government financial aid is limited by the Constitutional demands of the First Amendment.

Interest of the *Amici*

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.

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in this country. As such, it is vitally concerned with fundamental human rights and particularly with the constitutional rights of Black Americans.

The American Civil Liberties Union was founded in 1920 and is a national civil rights organization interested in the preservation of the civil liberties of all persons.

The *Amici* are among the leading civil rights and human relations agencies in the United States. Each of these organizations has filed numerous briefs *Amici* in this and other courts in the interest of securing the constitutional and statutory civil rights of all Americans. Each is national in scope and is able to address the issues raised in this appeal in the broad context of the unified national purpose to eradicate the scourge of racial discrimination.

The *Amici* submit this brief because they believe the instant case presents to this Court a serious challenge to the attainment of meaningful school desegregation, a goal which cannot be fully achieved so long as private schools are permitted to reject students solely on the basis of race.

Statement of the Case

Fairfax-Brewster School is located in Fairfax County, Virginia, where it operates a school program for children of pre-primary through the sixth-grade level as well as a summer camp program. The school receives no governmental assistance and is supported entirely by tuition payments derived from the families of its students. In the 1972-73 academic year the school's enrollment was 223 and in 1972 the camp enrollment was 236. Fairfax-Brewster advertises in the "yellow pages" of the telephone directory and distributes advertising in the area addressed to "Resident."

Bobbe's School, located in Arlington County, Virginia, operates a school program for the levels pre-primary through second grade. Like Fairfax-Brewster, Bobbe's School operates a summer camp program. The average enrollment of the school is 200 and that of the camp is 100. It receives no governmental funds or assistance and solicits students through advertisements in the classified pages of the telephone directory and by means of direct mail advertising.

Mr. and Mrs. Raymond Gonzalez first approached Fairfax-Brewster on behalf of their 5½-year-old son Colin in May 1969. They had learned of the school from its advertising and from a friend of their son who had attended the school's camp. After visiting the school with their son, Mr. and Mrs. Gonzalez decided to enroll him in the summer camp and have him continue in the first grade in the fall. They submitted a formal application and medical certificate accompanied by the requisite registration fee. On May 16, 1969 the medical certificate and registration fee were returned to Mr. and Mrs. Gonzalez accompanied by a form letter from Fairfax-Brewster stating that the school was "unable to accommodate the application." Mr. Gonzalez called the school regarding the rejection of his son's application. Captain Stuart A. Reiss, the Chairman of the Board of Fairfax-Brewster, answered the call and informed Mr. Gonzalez that "we are not integrated."

Following the rejection of Colin Gonzalez by Fairfax-Brewster, Raymond Gonzalez, in response to an advertisement in the classified directory, called Bobbe's School to inquire about enrolling his son. Mr. Gonzalez asked whether

the school was integrated and was told by a spokesman for Bobbe's School that only members of the Caucasian race were accepted. Colin Gonzalez is black.

In August 1972 and in response to an advertisement in a telephone directory, Mrs. Sandra McCrary telephoned Bobbe's School about enrolling her 2-year-old son Michael in the nursery school. After certain preliminary questions, Mrs. McCrary asked if the school was integrated and was told that it was not. Mrs. McCrary then asked if the school accepted black children and again was told that it did not. Michael McCrary is black.

The testimony of Mr. Gonzalez and Mrs. McCrary was corroborated by that of Mrs. Marjorie Bryant. In January 1972 she telephoned Fairfax-Brewster about enrolling her son, Grady. Mrs. Bryant was told that Grady could not attend the school because he was black. Mrs. Bryant called Bobbe's School and was given a similar reply.

Colin Gonzalez filed suit against Fairfax-Brewster and Bobbe's School. Michael McCrary and his parents filed suit against Bobbe's School. The actions were consolidated in the United States District Court for the Eastern District of Virginia. Plaintiffs contended that the actions of the schools denied them the same right to contract as is enjoyed by white persons and thereby violated 42 U.S.C. §1981.

Petitioner Southern Independent School Association (SISA) was permitted to intervene. In proof of its factual allegations SISA stipulated (1) that a substantial proportion of the schools represented by SISA deny admission to black applicants; (2) that SISA schools admit applicants in

the discretion of the school authorities; (3) that SISA schools are privately owned and supported entirely by tuition payments and (4) that SISA schools are generally located in areas having desegregated public education.

On this record the District Court adjudicated that the admission policies of defendant and intervenor schools constituted a violation of 42 U.S.C. §1981, enjoined defendants and intervenors from continuing to practice those policies and awarded damages to plaintiffs in varying amounts.

This decision was upheld by the United States Court of Appeals for the Fourth Circuit. The court, by Chief Judge Haynsworth, affirmed the findings of fact below, and, on the substantive legal question, held that although §1981 once served only the limited purpose of removing those legal disabilities which state statutes imposed on black people, subsequent decisions have expanded the scope of the statute to proscribe purely private acts of discrimination. *Tillman* v. *Wheaton-Haven Recreational Ass'n,* 410 U.S. 431 (1973); *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229 (1969); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968). In particular, the court held that although *Jones* considered a cause of action arising under §1982, §1981, the statute at bar, was also derived from the Civil Rights Act of 1866, is subject to the same analysis and must be interpreted in the same light. In so holding, the court reasoned that under §1981 it is not necessary that every white applicant to defendant schools be accepted in order for any blacks to be admitted; the statute only prohibits exclusions based on race, a standard not applied to white applicants.

The court further held that the application of §1981 to defendant and intervenor schools does not violate any rights of free association or privacy. Although *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), acknowledged the right of private schools to exist and to teach the doctrines and dogmas of their choosing, this right is not curtailed by a requirement that schools not discriminate on the basis of race. While certain school groupings may be so private, intimate and exclusive as to permit them to exclude the rest of the world, the defendant and intervenor schools do not fit into that class.

Judge Butzner concurred in the decision on the merits but dissented on the majority's reversal of the District Court's grant of attorneys' fees.

Judges Russell, Field and Widener concurred on the denial of attorneys' fees but dissented on the principal issue. The dissenting judges maintained that whereas the protections granted under §1982 involve "commercial transactions pure and simple," the issues at bar involve questions of status and the contractual nature of the relationship between student and school is only incidental. Moreover, the intimate size of the defendant and intervenor schools brings them into that realm of intimate, private and primary relationships which are beyond the reach of §1981.

Summary of Argument

In the aftermath of the Civil War this nation undertook to eliminate both the institution of slavery and the discriminatory practices incident thereto. An important vehicle for accomplishing this goal was the Civil Rights Act of 1866 which was reenacted in 1870 and has subsequently been codified, in part, at 42 U.S.C. §§1981-82.

In *Jones*, §1982 was held to prohibit racial discrimination by private persons as well as by governmental entities. In *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975), §1981 was held to prohibit racial discrimination in private employment. Both sections were passed under the same enactment, and both were intended to eradicate the same evils. The two sections differ only in that one prohibits private discrimination in connection with the transfer of property and the other prohibits discrimination in the right, *inter alia*, to make and enforce contracts.

The relationship between a student and a private school whereby one performs a service in return for consideration is clearly contractual. Although a contract in the traditional sense does not come about until after an offer is accepted, the right to make a contract is denied when one party refuses even to consider making an offer to an otherwise qualified applicant.

Nor does the application of §1981 to the defendant and intervenor schools limit their right to free association or to privacy. The right to associate, unlike the right to speak freely from which it is derived, must be balanced

against the compelling interest of the state in eliminating racial discrimination. Moreover, the essentially public character of the defendant and intervenor schools precludes them from asserting any right to privacy. In addition, the holding below is consistent with prior decisions of this Court regarding private education.

ARGUMENT

The admission practices of the defendant and intervenor schools violate 42 U.S.C. §1981.

In 1954 this Court found that "[s]eparate educational facilities are inherently unequal" and held that the Fourteenth Amendment prohibits racial discrimination by public schools. *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954). In the aftermath of the *Brown* decision segregated academies were founded for the express purpose of evading court-ordered integration.* The establishment of segregated academies was accelerated by this Court's decision in *Green* v. *County School Board*, 391 U.S. 430 (1968), which required affirmative action by school districts to implement desegregation. The growth of these academies has depleted the financial resources available for free public education in the South and has reduced the effectiveness of efforts to desegregate public education. As one commentator has noted:

> ". . . in many areas of the South efforts to eliminate segregation in public education have been nullified by the massive withdrawal of white children from the public schools and the concomitant establishment of a 'private' school system. This movement away from

* *Cf. Norwood* v. *Harrison*, 413 U.S. 455 (1973).

> public education threatens not only the achievements of fifteen years of integration efforts but also the very legitimacy of free public education in the South."

Note, *Segregation Academies and State Action*, 82 Yale L.J. 1436 (1973). The admissions practices of the academies represented herein as defendants and as members of intervenor SISA, therefore constitute the principal barrier to the effectuation of the goals set forth in *Brown*, that is, the guarantee to each American child that he will be afforded an equal educational opportunity devoid of the opprobrium of racial discrimination.

§1981 Proscribes Racial Discrimination by Private Persons in the Making and Enforcement of Contracts

§1981 was first enacted under the Thirteenth Amendment as part of Section 1 of the Civil Rights Act of 1866,* and provides, in pertinent part:

> "All persons within the jurisdiction of the United States shall have the same right in every State and

* In its original form §1 of the Civil Rights Act of 1866 included language which was subsequently codified into §1981 ("make and enforce contracts") and §1982 ("inherit, purchase, lease, sell, hold, and convey real and personal property"). §1, in pertinent part, stated:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

> Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . ."

The 1866 Act was enacted for the purpose of translating the "abstract truths" of the amendment into "practical freedom," Cong. Globe, 39th Cong., 1st Sess. 474, 1151 (1866), and was subsequently reenacted under the Fourteenth Amendment in 1870.

Prior to its decision in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), this Court had taken the position that the Thirteenth Amendment and the Civil Rights Act of 1866 enacted thereunder served to eradicate those "badges and incidents of slavery" as were imposed by state statute. *Hodges* v. *United States*, 203 U.S. 1 (1906); *Civil Rights Cases*, 109 U.S. 3 (1883). *See Corrigan* v. *Buckley*, 271 U.S. 323 (1926). In *Hurd* v. *Hodge*, 334 U.S. 24 (1948), although this Court did not directly confront the issue of purely private discrimination, it said, in *dictum*, that the 1866 Act was directed only toward "governmental action." 335 U.S. at 31.

In *Jones* this Court addressed a cause of action arising under 42 U.S.C. §1982, a statute prohibiting discrimination in the sale or lease of property which, like §1981, was derived from the Civil Rights Act of 1866. There the Court held that the 1866 Act was properly enacted under the Thirteenth Amendment and that it proscribed private acts of discrimination as well as those perpetrated by the states. In so holding the Court said:

> "It thus appears that, when the House passed the Civil Rights Act on March 13, 1866, it did so on the same assumption that had prevailed in the Senate:

> It too believed that it was approving a comprehensive statute forbidding *all* racial discrimination affecting the basic civil rights enumerated in the Act." 392 U.S. at 435. (Emphasis in original.)

Following *Jones*, this Court has on three separate occasions reaffirmed its interpretation of the Civil Rights Act of 1866 in cases involving other purely private acts of discrimination. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Tillman* v. *Wheaton-Haven Recreational Ass'n, Inc.*, 410 U.S. 431 (1973); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

In *Tillman* this Court recognized that §1981 and §1982, in view of their historic interrelationship should be construed in the same way. There, in remanding a claim under §1981 to the consideration of the trial court, this Court said:

> "The operative language of both §1981 and §1982 is traceable to the Act of April 9, 1866, §1, 14 Stat. 27. Hurd v. Hodge, 334 U.S. 24, 30-31, n.7 (1948). In light of the historical interrelationship between §1981 and §1982, we see no reason to construe these sections differently, when applied, on those facts, to the claim of Wheaton-Haven that it is a private club." 410 U.S. at 439-40.

In *Johnson* v. *Railway Express Agency, Inc., supra,* this Court expressly held that §1981 was applicable to racial discrimination by private employers.

It is clear, therefore, that private acts of discrimination, as well as those acts involving governmental participation, are proscribed under §1981.

§1981 Proscribes Racial Discrimination by Private Schools

§1981, applicable in general to private acts of discrimination, is particularly applicable to acts of discrimination such as that perpetrated herein. At the outset, it is clear that the relationship between a student and a private school is essentially contractual. The student pays a fee in consideration for the school's promise to provide certain educational services. Plainly, a contract does not come about until two or more parties have reached an agreement. But the right to "make" a contract, guaranteed by §1981, is abridged when the offeror refuses to consider a *bona fide* application because of the applicant's race. Refusals to deal have been held to constitute a denial of the right to contract accorded by §1981. *Olzman* v. *Lake Hills Swim Club, Inc.*, 495 F.2d 1333, 1339 (2d Cir. 1974). Moreover, a broad reading of the contract clause of §1981 would be consistent with this Court's holding in *Sullivan*, where, in rejecting a technical reading of the term "lease," the Court said:

> "A narrow construction of the language of §1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by §1 of the Civil Rights Act of 1866, 14 Stat. 27. . ." 396 U.S. at 238.

That the refusal by defendant and intervenor schools to admit black students constitutes a denial of the applicant's right to contract is consistent with the preponderance of judicial interpretations of §1981. Indeed, this Court in *Johnson* v. *Railway Express Agency, Inc., supra,* expressly

ruled that §1981 prohibits racial discrimination in private employment:

> "Although this Court has not specifically so held, it is well settled among the federal courts of appeals* —and we now join them—that §1981 affords a federal remedy against discrimination in private employment on the basis of race."

Other cases have expanded the scope of §1981 beyond the realm of employment discrimination. *Scott* v. *Young,* 421 F.2d 143 (4th Cir.), *cert. denied,* 398 U.S. 929 (1970); *Sims* v. *Order of United Commercial Travelers of America,* 343 F. Supp. 112 (D. Mass. 1972); *Grier* v. *Specialized Skills, Inc.,* 326 F. Supp. 856 (W.D.N.C. 1971); *United States* v. *Medical Society of South Carolina,* 298 F.Supp. 143 (D.S.C. 1969). In *Scott* the court held that "§1981, the sister of §1982, must be construed in similar broad fashion" and that the refusal of a recreational facility to admit blacks when it admitted all whites who were willing to pay the requisite fee involved a denial of contractual opportunity and violated §1981. In *Grier* the court reasoned that "§1981, like §1982, should be construed to give effect to the similar remedial legislative intent which it embodies," and held that §1981 was violated by a private barber training school's refusal to admit black students.

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*"Young v. International Tel. & Tel. Co., 438 F.2d 757 (CA3 1971); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (CA4), cert. denied, 409 U.S. 982, 93 S.Ct. 319, 34 L.Ed.2d 246 (1972); Caldwall v. National Brewing Co., 443 F.2d 1044 (CA5 1971), cert. denied, 405 U.S. 916, 92 S.Ct. 931, 30 L.Ed.2d 785 (1972); Long v. Ford Motor Co., 496 F.2d 500 (CA6 1974); Waters v. Wisconsin Steel Works, 427 F.2d 476 (CA7), cert. denied, 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970); Brady v. Bristol-Meyers, Inc., 459 F.2d 621 (CA8 1972); Macklin v. Spector Freight Systems, Inc., *supra.*"

There is no reason why §1981, clearly applicable to discrimination in private employment, should not encompass discrimination in private education. The school represents the most significant forum for a child's activity and expression outside the home and, necessarily, prepares him for subsequent employment. Denial of educational opportunity, whether by publicly or privately supported institutions, inevitably limits the opportunities of a child to successfully compete for gainful employment during his adult years.

The Application of §1981 to Private Schools Does Not Violate Petitioners' First Amendment Rights or Their Right of Privacy.

The freedom to associate is protected by the First Amendment. *Buckley* v. *Valeo,* 44 U.S.L.W. 4127, 4131 (U.S. Jan. 30, 1976); *Healy* v. *James,* 408 U.S. 169, 181 (1972); *NAACP* v. *Alabama,* 357 U.S. 449 (1958). But that protection is not absolute. It must give way to the extraordinary state interest in banishing racial discrimination. See *Pittsburgh Press* v. *Pittsburgh Human Relations Comm.,* 413 U.S. 376 (1973). The interest of the federal government in prohibiting racial discrimination is clear and has been expressed by Congress not only in the enactment of §1981 but, more recently, by the passage of the Civil Rights legislation of the 1960's. Civil Rights Act of 1964, Publ. L. No. 88-352, 78 Stat. 241; Civil Rights Act of 1968, Publ. L. No. 90-284, 82 Stat. 83. Nowhere has the interest of the nation in prohibiting discrimination been

more pronounced than in the field of education. *Brown* v. *Board of Education, supra; Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green* v. *New Kent County School Board*, 391 U.S. 430 (1968); *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969).

Nor does the application of §1981 to petitioners inhibit the teaching of doctrines which they espouse or the indoctrination of traditions which they deem significant. It does not even dictate to petitioners which students they must admit or the admissions standards which they must adopt. Nor can defendants and intervenors claim, as can purely political groups and parties, that private schools constitute an essential medium for the propagation of their ideology:

> "Racism and the desirability of segregation are relatively simple concepts which arguably could be communicated to children adequately at home without the necessity for a private school."

Note, *Section 1981 and Private Groups*, 84 Yale L. J. 1441, 1460 (1975).

Nor does the application of §1981 limit petitioners' right to privacy. Although that right may be invoked and in certain areas of conduct stands paramount, it protects conduct only to the extent that it is essentially private. *Roe* v. *Wade*, 410 U.S. 113, 153 (1973); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Stanley* v. *Georgia*, 394 U.S. 557 (1969); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

The petitioner schools can hardly claim that degree of intimacy as would remove them from the sphere of reasonable regulation. Private schools in general have long been subject to reasonable regulation. *Pierce* v. *Society of Sisters, supra; Meyer* v. *Nebraska*, 262 U.S. 390 (1923). States, for example, can impose upon private schools minimal curricular and health standards. *Farrington* v. *Tokushige*, 273 U.S. 284, 298-99 (1972); *Zucht* v. *King*, 260 U.S. 174, 176 (1922). Indeed, many states have enacted statutes expressly prohibiting racial discrimination in private schools.*

The claim of privacy by defendant and intervenor schools is particularly inappropriate. If they are "private" it is only to the extent that they receive no public funds and maintain no formal governmental ties. They accept all of those applicants who are white and meet their admissions criteria. They have student populations as large as those of many public schools. They advertise in the classified sections of telephone directories and

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* IDAHO CODE §§67-5902(10); 67-5909(6) (Burns 1973); IND. ANN. STAT. §§22-9-1-2(a), 22-9-1-3(l) (1974); MINN. STAT. ANN. §§363.01 Subd. 20, 363.03 Subd. 5 (Supp. 1974); MONT. REV. CODES ANN. §§64-305(4), 64-306(6) (Supp. 1974); N. J. STAT. ANN. §10:5-5(1) (Supp. 1974); S. DAK. COMPILED LAWS ANN. §§20-13-1(11), 20-13-22 (Supp. 1974); V. I. CODE ANN. tit. 10, §2 (1966). See also MASS. ANN. LAWS ch. 151C, §1(b) (Supp. 1974) (schools accepting admissions from the general public which are not "distinctly private"); N. Y. EXEC. LAW §296-4 (McKinney Supp. 1974) (school which holds itself out to the public); WASH. REV. CODE ANN. §9.91.010 (1961) (schools of special instruction nursery schools). *See generally*, Note, *Section 1981 and Private Groups, supra* at 1460-61.

through mailings addressed to "Resident." In many areas the intervenor schools have virtually supplanted the local public school systems and constitute the principal medium for the education of white children. See Note, *Segregated Academies and State Action, supra* at 1453.

Indeed, the avowed purpose of defendant and intervenor schools belies their claim of privacy. The schools were not set up as intimate groups for the propagation of certain concepts and ideas. They were founded to avoid the effects of court-ordered desegregation decrees. They had no purpose but to create a parallel school system open to every white child and closed to each black child. Thus, the Court is not confronted with a legitimate claim of privacy by an ethnic, fraternal or literary group. Rather, these schools represent the most recent of a series of attempts to avoid compliance with a fundamental national policy.*

The Decision Below Is Consistent With Prior Decisions of This Court Regarding Private Education

Although this Court has upheld the right of children to attend private schools and has recognized the importance of such schools in a comprehensive system of national education, nothing in those decisions permits or condones racial discrimination by private schools.

In *Pierce* v. *Society of Sisters, supra,* this Court recognized the right of parents to send their children to pri-

* See Note, *Segregation Academies and State Action,* 82 Yale L.J. 1436, 1440 (1973).

vate, rather than public schools. Nevertheless, the Court noted that

> "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them . . . ." 268 U.S. at 534.

The national policy against discrimination in private education was expressed in *Green* v. *Connally,* 330 F. Supp. 1150, 1163 (D.D.C. 1971), *aff'd sub nom., Coit* v. *Green,* 404 U.S. 997 (1971). There, in determining that contributions to private schools which discriminate against Blacks in admissions are not tax-deductible the three-judge court noted:

> "The Code must be construed and applied in consonance with the Federal public policy against support for racial segregation of schools, public or private.*

Norwood v. *Harrison, supra* at 457, did not reach the issue of the "right of citizens to maintain private schools with admission limited to students of particular national

* The court in *Green* was careful to distinguish between private schools which discriminate on the basis of race and *bona fide* sectarian schools:

> "The special constitutional provisions ensuring freedom of religion also ensure freedom of religious schools, with policies restricted in furtherance of religious purpose. Section 503 of the Model Anti-Discrimination Act . . . permits religious educational institutions 'to limit admission or give preference to applicants of the same religion.'" 330 F.Supp. at 1169.

The same distinction is recognized in recently issued Internal Revenue Service guidelines:

> "A school that selects students on the basis of membership in a religious denomination or unit thereof will not be deemed to have a discriminatory policy if membership in the denomination or unit is open to all on a racially nondiscriminatory basis," Federal Register, Vol. 40, No. 223, p. 53410, Sec. 3.03, November 18, 1975.

origins, race, or religion or the authority of the state to allow such schools." Although in *Norwood* the Court said that "[ ]uch private bias is not barred by the Constitution . . . ," this *dictum* is not unequivocal. On the very next page the Court notes:

> ". . . even some private discrimination is subject to special remedial legislation in certain circumstances under §2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts."

Moreover, the Court continues,

> "[i]nvidious private discrimination . . . has never been accorded affirmative constitutional protections." 413 U.S. at 470.

Conclusion

For the foregoing reasons, the *Amici* respectfully submit that this Court should affirm the decision below holding that the discriminatory practices of defendants and intervenors herein are prohibited under §1981.

Respectfully submitted,

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In the Supreme Court of the United States

Nos. 75-62, 75-66, 75-278 and 75-306

RUSSELL L. RUNYON, et al.,
Petitioners,

vs.

MICHAEL C. McCRARY, etc., et al.,
Respondents.

MOTION OF DADE CHRISTIAN SCHOOLS, INC., FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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MOTION OF DADE CHRISTIAN SCHOOLS, INC., FOR LEAVE TO FILE BRIEF AMICUS CURIAE

I.

INTRODUCTION

Pursuant to Rule 42 of the Rules of this Court, Dade Christian Schools, Inc., respectfully moves for leave to file a brief *amicus curiae* in the above referenced matters now pending on their merits before this Court.

II.

THE INTEREST OF DADE CHRISTIAN SCHOOLS, INC.

Dade Christian Schools, Inc. (Dade Christian) was chartered by the State of Florida in 1962 as a non-profit corporation to be engaged in the operation of a private school "guided in its operations, objectives, management, program and pursuits by Christian spiritual values." The founders of Dade Christian were members of the New Testament Baptist Church (New Testament), Miami, Florida, who, in response to this Court's decisions barring state-prescribed prayer and Bible reading in the public schools, were anxious to provide their children with Christian educations. Since its inception, Dade Christian has been an operating affiliate of New Testament and Dade Christian's operating policies have always been formulated and prescribed by New Testament.

Several years after Dade Christian was founded, the Dade County public schools, in compliance with federal court orders, began to take serious steps to eliminate the

vestiges of the former dual school system. The resulting public controversy caused the leadership of Dade Christian and New Testament to face, for the first time, the necessity of devising a policy on the racial composition of Dade Christian's student body. After consulting the Scriptures, the membership of New Testament decided that Dade Christian's student body should not be racially integrated; it was the consensus of the New Testament membership that racial integration of the school's student body would be contrary to the Divine scheme of things.

On July 26, 1973, Dade Christian excluded two young members of the black race from its student body solely for racial reasons. As a consequence, on August 6, 1973, Johnny Brown, Jr., and his family brought suit against Dade Christian and several of its then present and past officers for compensatory and punitive damages and injunctive relief. That action, which was filed in the United States District Court for the Southern District of Florida, Miami Division, and assigned Case No. 73-1313-Civ-JE, was premised primarily upon 42 U.S.C. §1981.

The defendants ~~registered~~ resisted the Brown family's action by:

(1) Admitting that the Brown children had been denied admission to Dade Christian solely for racial reasons;

(2) Asserting that 42 U.S.C. §1981 did not apply to a private school which does not accept governmental aid; and

(3) Claiming that Dade Christian's racially based admissions policy was beyond the reach of §1981 because it was based upon genuine religious beliefs and therefore protected by the Free Exercise of Religion Clause of the First Amendment to the United States Constitution.

United States District Judge Joe Eaton, relying upon *McCrary v. Runyon*, 515 F.2d 1082 (4th Cir., 1975), cert. granted, November 11, 1975, ____ U.S. ____ 44 USLW 3270-1, on May 28, 1975, rejected Dade Christian's defenses. Judge Eaton, on June 27, 1975, awarded the Brown family compensatory damages of $5,500.00 against Dade Christian and enjoined Dade Christian from barring the Brown children for racial reasons. Dade Christian appealed to the United States Court of Appeals for the Fifth Circuit on June 30, 1975, which assigned it Case No. 75-3260. The Fifth Circuit, on October 6, 1975, directed that Dade Christian's appeal be heard *en banc* together with the reargument of Case No. 74-1976, *Riley v. Adirondack Southern School for Girls*, 522 F.2d 622. The consolidated *en banc* hearing is presently scheduled to take place in New Orleans, Louisiana, during the week of January 19, 1976.

III.

DADE CHRISTIAN'S UNIQUE PERSPECTIVE

To the best of the undersigned's knowledge, Dade Christian is presently the *only* church-operated non-public day school engaged in litigation under 42 U.S.C. §1981. In addition, it appears that alone among the non-public day

schools engaged at this time in actions brought under §1981, Dade Christian's policy with respect to racial integration is founded upon religious beliefs.

In recent years, the growth of religiously-sponsored day educational institutions, especially those espousing Fundamentalistic views such as Dade Christian's, has been nothing short of spectacular, particularly in the southern portion of the United States. In contrast to "old line" private day schools, the species of school typified by Dade Christian appeals primarily to white, middle class families which frequently make difficult financial sacrifices in order to maintain their children in non-public schools. Such sacrifices are rarely made solely for "educational" reasons; they are often made in an effort to insure that their children are enveloped in "moral" surroundings in which they will "associate" with the "right" other children.

It is Dade Christian's opinion that its background and characteristics offer more compelling "associational" imperatives than do the profit-making private schools which were sued in *McCrary* and *Riley* and the non-profit schools affiiliated with the Southern Independent School Association, the intervenor in *McCrary*. Because the ultimate issue in the *McCrary* group of cases now pending before this Court may well be whether student-parent-school relationships in the non-public setting are, for purposes of §1981, properly viewed as "contractual" or "associational", Dade Christian respectfully submits that its unique experience in this area will enable it to make a significant contribution to this Court's resolution of this sensitive constitutional problem.

IV.

CONCLUSION

Had Judge Eaton elected not to await the Fourth Circuit's decision in *McCrary*, it is possible that Dade Christian would have been privileged to present its position on §1981 to this Court as a party litigant. The *amicus curiae* mechanism makes it possible for the same result to be achieved. For this reason, Dade Christian respectfully asks that this motion be granted.

Respectfully submitted,

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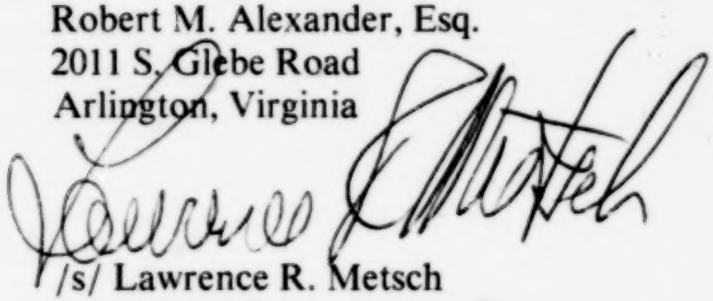

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in the

Supreme Court

of the

United States

Nos. 75-62, 75-66, 75-278 and 75-306

RUSSELL L. RUNYON, et al.,
Petitioners,

vs.

MICHAEL C. McCRARY, etc., et al.,
Respondents.

BRIEF OF DADE CHRISTIAN SCHOOLS, INC., AS AMICUS CURIAE

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	2
II. THE INTEREST OF DADE CHRISTIAN	2
A. The History of Dade Christian	2
B. The Brown-Riley Lawsuits	4
C. The Internal Revenue Service Rulings	10
III. SUMMARY OF ARGUMENT	16
IV. ARGUMENT	16
V. CONCLUSION	27
CERTIFICATE OF SERVICE	28
APPENDIX	App. 1

Constitutional Provisions

Amendment 1, United States Constitution .. 7, 16, 24, 26

Amendment 13, United States Constitution . 16, 17, 18, 21

Amendment 14, United States Constitution 17, 19

TABLE OF AUTHORITIES

Page

Statutes

Title 26, United States Code,
Section 170 ..... 5, 7, 9, 16, 18, 19, 22, 23, 26, 27

Title 26, United States Code, Section 501(c)(3) 21

Title 42, United States Code,
Section 1981 ..... 5, 7, 9, 16, 18, 19, 22, 24, 27

Title 42, United States Code, Section 1982 18

Title 42, United States Code, Section 2000a 21

Title 42, United States Code, Section 2000e 21

Title 42, United States Code, Section 3601 21

Cases

Brown v. Dade Christian Schools, Inc.,
hearing en banc ordered, 5 Cir. 1975, 522 F.2d
622 4

Cantwell v. Connecticut,
310 U.S. 296 (1940) 24

Cook v. The Advertiser Company, Inc.,
5 Cir. 1972, 458 F.2d 1119 23

TABLE OF AUTHORITIES (cont.)

Cases **Page**

Gilmore v. City of Montgomery,
417 U.S. 556 (1974) 21, 22

Green v. Connally,
D.D.C., 1971, 330 F.Supp. 1150,
affirmed *sub nom.*
Coit v. Green, 404 U.S. 997 (1971) 10, 24

Green v. Kennedy,
D.D.C., 1970, 309 F.Supp. 1127,
appeal dismissed *sub nom.*
Coit v. Green, 400 U.S. 986 (1971) 10

Griffin v. Breckinridge,
403 U.S. 88 (1971) 21

Johnson v. Railway Express Agency,
__ U.S. __ 44 L.Ed. 2d 295 (1975) 18

Bob Jones University v. Simon,
416 U.S. 725 (1974) 2, 15

Jones v. Alfred H. Mayer Co.,
392 U.S. 409 (1968) 18, 21

Linscott v. Millers Falls Co.,
440 F.2d 14 (1st Cir. 1971) 14

McCrary v. Runyon,
4 Cir., 1975, 515 F.2d 1082 ..... 7, 10, 27

TABLE OF AUTHORITIES (cont.)

Cases	Page
Meyers v. Nebraska, 262 U.S. 390 (1923)	19
Mitchell v. Pilgrim Holiness Church Corporation, 210 F.2d 879 (7th Cir. 1954), *cert. denied,* 347 U.S. 1013 (1954)	14
Mormon Church v. United States, 136 U.S. 1 (1890)	14
Murdock v. Pennsylvania, 319 U.S. 105 (1943)	24
National Association for the Advancement of Colored People v. Button, 371 U.S. 415 (1963)	17
National Association for the Advancement of Colored People v. State of Alabama ex rel. Patterson, 357 U.S. 449 (1958)	17
Norwood v. Harrison, 413 U.S. 455 (1973)	19, 21
Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925)	19, 25

TABLE OF AUTHORITIES (cont.)

Cases	Page
Reynolds v. United States, 98 U.S. 145, 166-167 (1878)	14
Riley v. Adirondack Southern School for Girls, M.D. Fla. 1973, 368 F.Supp. 392, rehearing en banc ordered, 5 Cir. 1975, 522 F.2d 622	8, 9
Sherbert v. Verner, 374 U.S. 398 (1963)	25, 26
Sullivan v. Little Hunting Park, 396 U.S. 229 (1969)	18
Tillman v. Wheaton-Haven Recreation Association, Inc., 410 U.S. 431 (1973)	18
United States v. Craft, 423 F.2d 829, 833 (9th Cir. 1970)	14
United States v. Seeger, 380 U.S. 163 (1965)	27
United States v. Spears, 443 F.2d 895 (5th Cir. 1971)	15
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)	24

TABLE OF AUTHORITIES (cont.)

Cases	Page
Wisconsin v. Yoder, 406 U.S. 205 (1972)	25, 26

Rulings

Revenue Ruling 71-447	10
Revenue Ruling 75-231	11, 13, 15, 24, 26

Law Review

Note, Section 1981 and Private Groups: The Right to Discriminate Versus Freedom From Discrimination, 84 Yale Law Journal 1441 (1975)	19

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BRIEF OF DADE CHRISTIAN SCHOOLS, INC., AS AMICUS CURIAE

I. INTRODUCTION

Pursuant to this Court's order of January 12, 1976, Dade Christian Schools, Inc., (Dade Christian) respectfully submits this its brief as *amicus curiae* in support of the Petitioners' position.

II. THE INTEREST OF DADE CHRISTIAN

A. *The History of Dade Christian*

The New Testament Baptist Church (New Testament) was founded approximately twenty years ago in Miami, Florida, under the leadership of the Rev. Dr. A. C. Janney. It was conceived as a wholly independent religious group with a theological outlook similar to that espoused by the Rev. Bob Jones. See, *Bob Jones University v. Simon*, 416 U.S. 725 (1974). Dr. Janney still serves New Testament as its spiritual leader and the group's membership is approximately four thousand people.

Dade Christian was chartered by the State of Florida in 1962 as a non-profit corporation to be engaged in the operation of a private school "guided in its operations, objectives, management, program and pursuits by Christian spiritual values." The founders of Dade Christian were members of New Testament who, in response to this Court's decisions barring state-prescribed prayer and Bible reading in the public schools, were anxious to provide their children with Christian educations. Since its inception, Dade Christian has been an operating affiliate of New Testament, Dade Christian's physical facilities have been

on the premises of New Testament, Dade Christian's operating policies have been formulated by New Testament, and Dade Christian's president has been Dr. Janney.

After consulting the Scriptures, the membership of New Testament, by means of a vote taken on July 17, 1963, decided that the Church should not be racially integrated; it was the consensus of the Church membership that racial integration would constitute a tacit endorsement of racial intermarriage, a practice clearly contrary to the Divine scheme of things. Subsequent to that vote, the public controversy generated by the desegregation of the Dade County, Florida, public schools caused the leadership of Dade Christian and New Testament to face the necessity of devising a policy with respect to the racial composition of the school's student body. Guided by the Church's prior decision not to integrate its membership, Dade Christian decided that its student body should also not be integrated.

On July 26, 1973, Mrs. Marice Brown and her two daughters, Valerie Michelle Brown and Jacqueline Marie Brown, members of the black race, appeared at the premises of Dade Christian, 6601 N. W. 167th Street, Miami, Florida 33015, for the purpose of enrolling the two girls in the day school program operated by Dade Christian. Mrs. Brown and her two daughters reported to the admissions office. The receptionist furnished Mrs. Brown with several pieces of informational literature and two application forms. Mrs. Brown began to complete the forms, but before she was able to write down all the information requested, a school official appeared and beckoned Mrs. Brown and her two daughters into another room. Mrs.

Brown and the two girls went into an adjacent room and the school official closed the door behind them. The official then handed a pre-printed statement to Mrs. Brown, the text of which read as follows:

DADE CHRISTIAN SCHOOLS
6601 N. W. 167th Street
Hialeah, Florida 33015

We are very sorry . . .
But the policy of the school is one of non-integration and we would request that you respect this policy.

School Administration

The school official then directed Mrs. Brown and her two daughters to the building's exit. They left the building, at which time Mrs. Brown used a public telephone to call her home. In response to Mrs. Brown's call, her husband, Johnny Brown, Jr., drove to the school and took his wife and daughters home.

B. *The Brown-Riley Lawsuits*

(1) *Brown v. Dade Christian Schools, Inc.*

On August 6, 1973, the Brown family brought suit in the United States District Court for the Southern District of Florida, Miami Division, against Dade Christian, Dr. Janney, V. S. Ackerman, John M. Kalapp, and Arthur E. Kreft seeking damages and injunctive relief. That action was assigned to United States District Judge Joe Eaton and

was given Civil Action No. 73-1313. The complaint alleged that the defendants had violated the plaintiffs' federally-protected civil rights by excluding, solely upon the basis of race, Valerie Michelle Brown and Jacqueline Marie Brown, from Dade Christian's student body. Although the complaint alleged violations of several civil rights statutes, the plaintiffs eventually premised their claim for relief solely upon 42 U.S.C. §1981.

Dade Christian and the individual defendants (past and then-present officers of the school) answered the complaint by admitting that the Brown children had been denied admission to Dade Christian solely because of their membership in the black race. In addition to denying that §1981 was applicable to Dade Christian, the defendants affirmatively asserted:

"13. Defendant Dade Christian Schools, Inc., is an operating affiliate of the New Testament Baptist Church, Miami, Florida.

"14. The non-corporate defendants are members of the New Testament Baptist Church, Miami, Florida.

"15. The educational facility to which the minor plaintiffs sought admission on July 26, 1973, is located on the premises of the New Testament Baptist Church, Miami, Florida.

"16. Since its founding, the operating policies of Defendant Dade Christian Schools, Inc., have been formulated and prescribed by the New Testament Baptist Church, Miami, Florida.

"17. On several occasions subsequent to the founding of Defendant Dade Christian Schools, Inc., the New Testament Baptist Church resolved not to accept black students in the facilities of Defendant Dade Christian Schools, Inc.

"18. The resolutions referred to in paragraph 17 of this amended answer were based upon biblical directives, as interpreted by the church leadership and membership, forbidding the commingling of the white and black races under circumstances which may tend to promote interracial marriage.

"19. In light of the religious basis for the resolutions referred to in paragraphs 17 and 18 of this amended answer, the application to defendants of the federal statutes mentioned in paragraph 1 of the complaint so as to penalize defendants for their policy of excluding black students from Defendant Dade Christian Schools, Inc., would constitute a violation of the rights, privileges and immunities of defendants and those for whom they have acted under the Free Exercise of Religion Clause of the First Amendment to the United States Constitution and the Due Process Clause of the Fifth Amendment to the United States Constitution."

On May 28, 1975, Judge Eaton rendered oral findings of fact and conclusions of law with respect to the liability

phase of the case. The District Court's findings and conclusions were transcribed by the court reporter and are reprinted at pages 1 through 20 of the Appendix to this brief. In essence, Judge Eaton held (1) that under the majority opinion in *McCrary v. Runyon*, 4 Cir., 1975, 515 F.2d 1082, §1981 applied to Dade Christian's racially discriminatory admissions policy; and (2) Dade Christian's policy of excluding blacks from its student body was not "religiously" based within the contemplation of the Free Exercise Clause of the First Amendment to the Constitution. Final judgment in favor of the Brown family and against Dade Christian alone was entered on June 27, 1975, the text of which appears at pages 21 through 23 of the Appendix to this brief. Dade Christian filed its notice of appeal to the United States Court of Appeals for the Fifth Circuit on July 1, 1975. The Court of Appeals later assigned Case No. 75-3260 to Dade Christian's appeal.

(2) *Riley v. Adirondack Southern School for Girls*

Arlizabeth Riley, individually and as mother and next friend of an infant-plaintiff, Marcellette Riley, brought suit in the United States District Court for the Middle District of Florida, Tampa Division, against a private girls' school, Adirondack Southern School for Girls, and its headmaster, Dr. George H. Longstaff. The plaintiffs alleged that the defendants had refused to admit the minor plaintiff into the school's first grade because of the school's policy of excluding black applicants, that policy being in violation of §1981. The defendants denied that the school maintained a racially discriminatory admissions policy and contended that the young lady had been refused admission because of immaturity.

A non-jury trial was held by United States District Judge Wm. Terrell Hodges on October 29, 1973. On December 19, 1973, Judge Hodges rendered judgment for the defendants. *Riley v. Adirondack Southern School for Girls,* M.D. Fla., 1973, 368 F. Supp. 392. The District Court in *Riley* reasoned that although evidence had been presented at trial tending to establish that race had been a factor in the school's decision to reject Miss Riley, the plaintiffs had not sustained their burden of proving that the young lady, but for the defendants' racially-premised admissions policy, would have been qualified for entry into the school's student body. A timely appeal was taken by the plaintiffs to the United States Court of Appeals for the Fifth Circuit, which assigned it Case No. 74-1976.

The United States of America, appearing through the Civil Rights Division of the Department of Justice, on December 24, 1974, filed its brief as *amicus curiae* in *Riley* with the Fifth Circuit. That brief supported the position taken by the Riley's and argued that the District Court had incorrectly construed §1981 to apply only to situations in which race is the sole factor considered by a defendant.

Following the submission of the United States' brief as *amicus curiae* in *Riley,* Dade Christian filed its brief as *amicus curiae* with the Court of Appeals in support of the defendants. The Dade Christian brief urged that the District Court's judgment be affirmed, but not on the basis of Judge Hodges' opinion. Instead, Dade Christian asked the Fifth Circuit to affirm the District Court on the theory that §1981 does not apply to private schools which do not receive state assistance.

A panel of the Fifth Circuit heard oral argument in *Riley* on March 10, 1975, at Jacksonville, Florida. Although the United States did not participate in that proceeding, counsel for Dade Christian, arguing that §1981 should not be held applicable to self-supporting private schools, did. Before the panel produced a decision, the Court of Appeals, on June 30, 1975, ordered that the submission to the panel be vacated and the case heard *en banc.* The parties and *amici curiae* were advised that supplemental briefs could be filed for the consideration of the *en banc* Court.

The United States of America, again appearing through the Civil Rights Division of the Department of Justice, on July 21, 1975, submitted to the Court of Appeals a supplemental brief as *amicus curiae* which argued that §1981's prohibition against racial discrimination was applicable to the admissions policies of Adirondack Southern School for Girls and that §1981, as so applied, was a constitutional exercise of Congress' power to enforce the Thirteenth Amendment to the Constitution. Oral argument to the *en banc* Fifth Circuit was presented on September 16, 1975, at New Orleans, Louisiana, in which proceeding the United States participated in support of the Riley's and Dade Christian in support of the defendants.

The Court of Appeals did not hand down a decision in *Riley.* Instead, on October 6, 1975, it directed that Dade Christian's appeal be heard *en banc* together with the reargument *en banc* of *Riley.* 522 F.2d 622. Initially, the Court of Appeals indicated that it would hear oral argument in the consolidated appeals during the week of January 19, 1976. However, on December 23, 1975, the Clerk

of the Fifth Circuit wrote to all counsel of record that "the Court has instructed this office to notify counsel that the above cases are being held pending the decision of the Supreme Court in *McCrary v. Runyon*, 4th Circuit, 1975, 515 F.2d 1082."

C. *The Internal Revenue Service Rulings*

In *Green v. Kennedy*, D.D.C., 1970, 309 F.Supp. 1127, appeal dismissed *sub nom. Coit v. Green*, 400 U.S. 986 (1971), the United States District Court for the District of Columbia preliminarily enjoined the Secretary of the Treasury and the Commissioner of Internal Revenue from according tax exempt status to private schools in Mississippi which excluded black students on the basis of race or color. Thereafter, the Internal Revenue Service, in July, 1970, announced that "it can no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination nor can it treat gifts to such schools as charitable deductions for income tax deductions." See, Revenue Ruling 71-447, 1971-2 C.B. 230. The District Court, in *Green v. Connally*, D.D.C., 1971, 330 F.Supp. 1150, affirmed *sub nom. Coit v. Green*, 404 U.S. 997 (1971), placed its stamp of approval upon the Internal Revenue Service's new policy. Revenue Ruling 71-447 was the basis for Dade Christian's subsequent loss of its tax exempt status.

The District Court's opinion in *Green v. Connally*, supra, contained the following prophetic passage:

> "The special constitutional provisions ensuring freedom of religion also ensure freedom of religious schools, with policies restricted in furtherance of religious purpose. Section 503 of the Model Anti-Discrimination Act, *supra* note 37, permits religious educational institutions 'to limit admission or give preference to applicants of the same religion.' We are not now called upon to consider the hypothetical inquiry whether tax-exemption or tax-deduction status may be available to a religious school that practices acts of racial restriction because of the requirements of the religion. Such a problem may never arise; and if it ever does arise, it will have to be considered in the light of the particular facts and issue presented, and in light of the established rule, *see* Mormon Church v. United States, 136 U.S. 1 (1890), that the law may prohibit an individual from taking certain actions even though his religion commands or prescribes them." 330 F.Supp. at 1169.

On May 22, 1975, the Internal Revenue Service issued Revenue Ruling 75-231, the purpose of which was to deny tax exempt status to organizations, including churches, that conduct schools with a policy of refusing to accept children from certain racial or ethnic groups. The Ruling posited the following factual situations:

> "*Situation 1*.
>
> "*X* was organized as a separate corporate entity under the auspices of an organization qualifying as a church for the express purpose of operating a school for the children of the local community

in which the church regularly conducts secretarian religious services. The governing body of the church is a council whose members are selected from the church's congregation. The council selected the original members of *X's* board of directors and maintains full control over all aspects of its operating program.

"*X* maintains and operates a school program that corresponds with the public school program for the same grades. Although its program includes a 10-minute religious service at the start of each school day and the devotion of other amounts of time to religious themes and subjects, the school complies with State law requirements for public education. The school has a policy of refusing to accept any children from certain racial and ethnic groups.

"*Situation 2.*

"An organization qualifying as a church, having a full complement of active religious functions, directly supervises and controls, as part of its overall operations, *Y* school. *Y* is not separately incorporated. *Y's* operations do not differ in any material respect from those carried on by *X* in *Situation 1*, including, as a matter of school policy, the exclusion of students from certain racial and ethnic groups.

"*Situation 3.*

"*Z*, an organization qualifying as a church, operates a school identical to *Y* in Situation 2. *Z* also organized and controlled as a separate corporate entity a school identical to *X* in *Situation 1*. *Z* asserts that the policy observed by the two schools of excluding children from certain racial and ethnic groups is required by the tenets of the religion it embraces."

Whether by design or by accident, Situation 3, supra, substantially describes the facts and circumstances governing the relationship between New Testament and Dade Christian. Discerning from the body of this Court's decisions and the enactments of the Congress a "well-established Federal public policy against racial discrimination in education, whether public or private", the Internal Revenue Service concluded that the religious organizations described in the three situations, supra, were not eligible for tax-exempt status under §501(c)(3) and §170 of the Internal Revenue Code. Revenue Ruling 75-231 specifically denied tax-exempt status to those religious entities engaging in racially or ethnically discriminatory school admissions policies on the basis of religious beliefs:

> "*Situation 3* differs from *Situations 1* and *2* in that *Z* asserts that a tenet of the religion which it embraces requires that the schools maintain a racially discriminatory policy as to students. It is well-settled that a religious basis for an activity will not serve to preclude governmental interference with that activity if it is otherwise clearly

contrary to Federal public policy. Thus, for example, the Supreme Court in *Mormon Church v. United States,* 136 U.S. 1 (1890), upheld the constitutional validity of a series of Federal statutes that, among other things, had abrogated the corporate charter previously granted to the members of a specific church by a special act of the territorial legislature of Utah and had directed the institution of judicial proceedings for a complete winding up of its affairs, all because of its persistent promotion and defense of polygamy in direct violation of Federal statutory law.

"That those responsible for a given course of conduct may sincerely believe that they have a religious duty to act in a certain manner does not alter the situation. The First Amendment, which provides in part that Congress shall make no law prohibiting the free exercise of religion, does bar governmental interference with mere religious beliefs and opinions, but it does not affect the legal consequences otherwise attending a given practice or action that is not inherently religious. *See Reynolds v. United States,* 98 U.S. 145, 166-167 (1878); *Mitchell v. Pilgrim Holiness Church Corporation,* 210 F.2d 879 (7th Cir. 1954), *cert. denied,* 347 U.S. 1013 (1954); *U.S. v. Craft,* 423 F.2d 829, 833 (9th Cir. 1970); and *Linscott v. Millers Falls Co.,* 440 F.2d 14 (1st Cir. 1971).

"The important distinction between religious belief, on the one hand, and the legal consequences that may validly be attached to action induced by

religious belief, on the other, is well illustrated by one recent line of cases interpreting the Federal drug laws. The courts have repeatedly refused to engraft a religious exception on any criminal statute outlawing the transportation of heroin, marijuana and peyote into the United States, notwithstanding an apparent judicial recognition that a given accused might sincerely believe the use of such drugs has a proper place in certain religious ceremonies which are prescribed in both the Koran and the Bible. *See U.S. v. Spears,* 443 F.2d 895 (5th Cir. 1971), and other cases therein cited.

"Accordingly, in *Situation 3* neither the separately incorporated school nor *Z* itself is operated exclusively for charitable purposes and neither qualifies as a charity for Federal income tax deduction and exemption purposes under sections 170 and 501(c)(3) of the Code."

As this Court noted in *Bob Jones University v. Simon,* supra, 416 U.S. at 749-750, it is not presently possible for a taxpayer to obtain advance judicial review of a revocation by the Internal Revenue Service of the exempt status of an otherwise eligible charitable entity which practices racial discrimination. Consequently, while Dade Christian came under the coercive impact of the District Court's June 27, 1975, injunctive order, New Testament was compelled to comply with Revenue Ruling 75-231 rather than face the disastrous prospect of the loss of its tax exempt status.

III. SUMMARY OF ARGUMENT

A. To properly accommodate the conflicting constitutional claims asserted in these cases, §1981 should be interpreted as inapplicable to the relationships among private schools, parents and students.

B. Should this Court conclude that §1981 does apply to the racially discriminatory admissions policies of private schools, the door should not be closed to the interposition of a defense predicated upon the Free Exercise Clause of the First Amendment to the Constitution.

IV. ARGUMENT

A. To properly accommodate the conflicting constitutional claims asserted in these cases, §1981 should be interpreted as inapplicable to the relationships among private schools, parents and students.

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

This Court has repeatedly recognized as protected by the First Amendment a freedom to associate without governmental interference. For example, in *National Association for the Advancement of Colored People v. State of Alabama ex rel. Patterson*, 357 U.S. 449 (1958), this Court held that the State of Alabama's order demanding the production of the Association's membership lists violated the Association's freedom of association as guaranteed by the Due Process Clause of the Fourteenth Amendment. Similarly, in *National Association for the Advancement of Colored People v. Button*, 371 U.S. 415 (1963), this Court held that the Association's program of providing free legal services to individuals aggrieved by racially discriminatory practices was protected from State restrictions by the First and Fourteenth Amendments.

The Thirteenth Amendment to the United States Constitution provides:

> "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> "Section 2. Congress shall have power to enforce this article by appropriate legislation."

Section 1981, Title 42, United States Code, provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue,

be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1982, Title 42, United States Code, provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

This Court has held that §1982 applies to private racially discriminatory action and, as so applied, represents a proper exercise of legislative power under Section 2 of the Thirteenth Amendment. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); and *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 410 U.S. 431 (1973). Additionally, this Court has indicated that §1981, like §1982 derived from the Civil Rights Act of 1866, 14 Stat. 27, is also constitutionally applicable to private racially discriminatory conduct. *Johnson v. Railway Express Agency*, _____ U.S. _____, 44 L.Ed. 2d 295 (1975).

Clearly, the instant cases present a direct clash of constitutional claims: the schools involved assert that the freedom of association guaranteed by the First Amendment authorizes them to use racially discriminatory admissions criteria with impunity, while the plaintiffs

contend that §1981 supersedes any associational considerations. See, Note, Section 1981 and Private Groups: The Right to Discriminate Versus Freedom From Discrimination, 84 Yale Law Journal 1441 (1975). Dade Christian believes that this confrontation may be appropriately resolved through an analysis of several of this Court's decisions.

In *Meyers v. Nebraska*, 262 U.S. 390 (1923), this Court reversed a state court conviction obtained following a violation of a statute making it a misdemeanor to teach a foreign language to a child who had not passed the eighth grade of school. This Court declared that the Nebraska statute infringed upon the accused's liberty as a teacher under the Fourteenth Amendment and that there existed no emergency condition to constitutionally justify the State's action.

Citing the *Meyers* decision, this Court, in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925), invalidated an Oregon statute establishing criminal penalties for parents of children between the ages of eight and sixteen years who were not enrolled in public schools. It was held in *Pierce* that the challenged statute unreasonably interfered with the "liberty" of parents and guardians to direct the upbringing and education of children under their control.

The *Pierce* decision was cited by this Court in *Norwood v. Harrison*, 413 U.S. 455 (1973), wherein this Court declared unconstitutional a Mississippi program under which the State purchased textbooks and then lent them to students in both public and private schools, even though

a number of the private schools so benefited had racially discriminatory admissions policies. This Court reasoned that the one-race private schools could not legitimately expect to receive tangible assistance from the State. However, as the following excerpt from the *Norwood* opinion indicates, this Court was careful to preserve the right of private schools to operate on a racially discriminatory basis as long as State help was not accepted:

> "Like a sectarian school, a private school — even one that discriminates — fulfills an important educational function; however, the difference is that in the context of this case the legitimate educational function cannot be isolated from discriminatory practices — if such in fact exist. Under Brown v. Board of Education, supra, discriminatory treatment exerts a pervasive influence on the entire educational process. The private school that closes its doors to defined groups students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in education. There is no reason to discriminate against students for reasons wholly unrelated to individual merit unless the artificial barriers are considered an essential part of the educational message to be communicated to the students who are admitted. *Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws,* but neither can it call on the Constitution for material aid from the State. (emphasis supplied) 413 U.S. at 469.

The *Norwood* decision is also significant because it distinguished between private racially discriminatory conduct occurring in educational contexts and in non-educational contexts:

> "In contrast, although the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections. *And even some private discrimination is subject to special remedial legislation in certain circumstances under §2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts* (citing, in footnote 10, *Griffin v. Breckinridge,* 403 U.S. 88 (1971); *Jones v. Alfred H. Mayer Co.,* supra; 42 U.S.C. §2000a; 42 U.S.C. §2000e; and 42 U.S.C. §3601)." (emphasis supplied) 413 U.S. at 469-470.

This Court touched again upon the racially discriminatory admissions policies of some private schools in *Gilmore v. City of Montgomery,* 417 U.S. 556 (1974). In that case, this Court affirmed the Fifth Circuit's prohibition against the exclusive possession of public recreational facilities for official athletic contests and similar functions sponsored by racially segregated private schools. Additionally, this Court remanded the matter for further proceedings concerning the nonexclusive use of city facilities by

racially segregated private schools or nonschool groups. The *Gilmore* decision is noteworthy here because it at no point even hinted that racially segregated private schools could not, consistent with federal law, exist. On the contrary, the *Gilmore* decision closed with the following warning:

> "We close with this word of caution. It should be obvious that the exclusion of any person or group — all-Negro, all-Oriental, or all-white — from public facilities infringes upon the freedom of the individual to associate as he chooses, Mr. Justice Douglas emphasized this in his dissent, joined by Mr. Justice Marshall, in Moose Lodge. He observed, 'The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. The individual can be as selective as he desires.' 407 U.S. at 179-180." 417 U.S. at 575.

Although not explicitly articulated in the foregoing decisions, the outcomes in those cases can be harmonized upon the basis that the relationships which exist among private schools, their students and their students' parents are primarily *associational*, as opposed to contractual, in nature. Consequently, as this Court's decisions reflect, it would not be appropriate to apply §1981 to the racially discriminatory admissions policies of private schools which receive no material aid from governmental entities.

This Court's well-established protective approach to

self-sustaining private schools is premised upon the realization that parents who elect to forego the "free" educations provided by the public schools in order to insure special educational experiences for their children are not merely purchasing educational services. More accurately, such parents, often at great financial sacrifice, are attempting to control the associational environments in which their children grow to maturity.

The interpretive approach which Dade Christian is recommending to this Court is not a novel one in the §1981 context. The Fifth Circuit, in *Cook v. The Advertiser Company, Inc.*, 5 Cir., 1972, 458 F.2d 1119, affirmed the District Court's dismissal of a §1981 action against a newspaper based upon the newspaper's refusal to publish the wedding announcement of a black couple on the society page. The Court of Appeals, obviously concerned with the free press implications of the plaintiff's claim, found that no "contract" could ever come into existence for the publication of a wedding announcement, thereby rendering §1981 inapplicable.

Should this Court concur with Dade Christian that the relationships involved herein are not primarily contractual but associational, then it would follow (along the line of reasoning employed in *Cook*, supra) that, in order to preserve the associational rights embodied in the First Amendment, §1981 should not be interpreted to apply to the racially discriminatory admissions policies of private schools. The acceptance of this approach by this Court would result in the reversal of the judgments rendered by the Fourth Circuit in these cases.

B. Should this Court conclude that §1981 does apply to the racially discriminatory admissions policies of private schools, the door should not be closed to the interposition of a defense predicated upon the Free Exercise Clause of the First Amendment to the Constitution.

The opinion of the District Court in *Green v. Connally*, supra, and Revenue Ruling 75-231 proceeded upon the notion that the development of the Free Exercise jurisprudence, as it pertains to the activities of unorthodox religious sects, came to a halt with this Court's decisions dealing with the practice of polygamy by the Mormon community in the Utah Territory. Nothing could be further from the truth.

In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court, relying in great measure upon the Free Exercise Clause, reversed the state court convictions of members of the Jehovah's Witnesses sect for violating a statute prohibiting the solicitation of contributions to any religious, charitable, or philanthropic cause without the prior approval of the secretary of the public welfare council. A similar result with respect to the solicitations of Jehovah's Witnesses emerged in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

This Court, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), barred the enforcement of a state statute and a regulation of the State Board of Education requiring public school pupils to take part in a salute to the United States flag against members of the Jehovah's Witnesses. Noting that the flag salute ritual

was incompatible with the religious beliefs of that group, this Court held that the Free Exercise Clause prohibited the state officials from compelling participation in the salute by Jehovah's Witnesses.

In *Sherbert v. Verner*, 374 U.S. 398 (1963), this Court ruled that the State of South Carolina could not, consistently with the Free Exercise Clause, deny unemployment compensation benefits to a Seventh Day Adventist because she was not available for work on Saturdays. The *Sherbert* decision is especially significant with respect to the instant cases because it applied the "compelling state interest" test to governmental efforts to regulate or restrict religiously-motivated activity. 374 U.S. at 403. That decision is also noteworthy by virtue of the following passage:

> "On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, it is not totally free from legislative restrictions . . . *'The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order . . .'*" (emphasis supplied, citations omitted) 374 U.S. at 402-403.

This Court, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), found that the State's interest in insuring that its young people are adequately educated did not outweigh the religiously-motivated refusal by members of the Old Amish sect to send their children to school beyond the

eighth grade or the age of sixteen years. Accordingly, this Court affirmed the Wisconsin Supreme Court's reversal of convictions obtained against members of that group under the State's compulsory school attendance statute. The *Yoder* decision of this Court not only explicitly reconfirmed the *Pierce* doctrine of parental control over the educational progress of their children, it underlined the extent to which this Court has exalted the status accorded the Free Exercise Clause in our constitutional universe:

> *"The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."* (emphasis supplied) 406 U.S. at 215.

In light of the foregoing pronouncements, it is difficult for Dade Christian to understand how the Internal Revenue Service, in Revenue Ruling 75-231, could display so little respect for the religiously-inspired admissions policies of the affected organizations. In Dade Christian's view, the racially discriminatory admissions policies of church-affiliated private schools could not possibly pose a "substantial threat to public safety, peace or order." *Sherbert v. Verner*, supra. Because universal public education prevails throughout the United States, Dade Christian believes that there exist no "overbalancing" interests which can neutralize a properly raised Free Exercise Clause claim by a church-affiliated private school which selects its students on the basis of race. *Wisconsin v. Yoder*, supra.

The schools named as defendants in the instant cases are not church-affiliated. Consequently, no Free Exercise Clause claims are presently involved. However, Dade Christian respectfully asks that if this Court should determine that private schools are subject to §1981, a caveat be incorporated into the decision of this Court leaving open the possibility that a legitimate claim under the Free Exercise Clause would defeat a §1981 claim. Of course, any claim asserted under the Free Exercise Clause would be subject to judicial scrutiny under the "sincerity" test of *United States v. Seeger*, 380 U.S. 163 (1965).

V. CONCLUSION

The judgments of the United States Court of Appeals for the Fourth Circuit in *McCrary v. Runyon*, 515 F.2d 1082 (1975), should be reversed and the causes should be remanded to the Court of Appeals with directions that the District Court be ordered to dismiss the complaints.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing brief were mailed this 21st day of January, 1976, to the following:

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APPENDIX

App. 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 73-1313-Civ-JE

JOHNNY BROWN, JR., etc., et al.,
Plaintiffs,

vs.

DADE CHRISTIAN SCHOOLS, INC., etc., et al.,
Defendants.

(Filed May 28, 1975)

FINDINGS OF FACT and CONCLUSIONS OF LAW

What this Court is about to say constitutes findings of fact and conclusions of law on some of the issues in the case, but not all, as you agreed.

When this case was filed there were pending in the United States Court of Appeals for the Fourth Circuit, the case of McCrary v. Runyon and the Southern Independent School Association, two cases, consolidated. Everybody involved in this case before this Court recognized that that case would control the initial question before this Court. I think it fair to say, and the Court announces this as being true, that the facts in the Fourth Circuit Court of Appeals case comport with the facts in this case and we, in the exercise of sound judicial judgment, waited until that case was decided. It took considerably

longer to decide than we had thought it would, but for reason of the appellate process, and because of the consequences of this case, I know from some experience that that procedure was a wise one to follow.

Now, the Fourth Circuit Court of Appeals divided four to three on the primary question and it is not necessary to recite the primary question. You all know what it is. I shall simply say briefly that the question there was whether a school which holds itself out generally to the public, though it is referred to as a private school, that means one with no state funds, not supported by governmental funds, whether such a school may, by choice, exclude black applicants on the basis of the fact that they are black, there being no nexus between government and the operation of the school.

The first thing that is important to understand in this cause is that the plaintiffs did not present a constitutional question. This is not an equal protection type case. This is not a constitutional question at all as presented by plaintiffs. It is the defendants who have raised the constitutional question as a defense. This case, as did the Court of Appeals' case referred to, turns upon the interpretation of the old civil rights statute regarding non-discrimination in contracts, a law passed by Congress back in the 1890s.

The United States Court of Appeals, in McCrary, held in a divided decision, that the statute did in fact apply when an applicant seeks entry into a school, even though that school has no nexus with government as far as funding, control, etc.

The Court held that it was, in fact, a contractual arrangement that was being applied for and that if a party was discriminated against because he was black, that that statute would apply and would preclude such discrimination.

A Federal Judge in Virginia by the name of Bryan originally ruled that and the ruling was upheld, was affirmed by the Court of Appeals by a four to three vote. That case is controlling here and the Court, of course, will follow it.

There is presently pending in the Fifth Circuit Court of Appeals a case which went up well after the McCrary case was lodged in the Fourth Circuit Court of Appeals. The case is not directly in point with this one but it is related and it is my professional opinion that that case will be some time in being decided. I would not be surprised at all if the Court were embanked for that determination. Having waited as we did, having understood that we were looking to the Fourth Circuit teachings and because the Fourth Circuit case is directly on point and the Fifth Circuit case is not directly on point, this Court will, in fact, make the rulings that it is making now. I would not be at all surprised if the Fifth Circuit in the related case ruled to some degree contrary to the ruling of the Fourth Circuit, but District Courts cannot anticipate that. I would not be at all surprised if the Supreme Court of the United States ruled contrary to the four to three ruling in the Fourth Circuit, however, this Court follows the law as it is written and does not have the right to anticipate rulings because, of course, it does not know what they are going to be.

Therefore, having ruled that McCrary v. Runyon is controlling in the case before this Court, the Court adopts that majority rule. That leads us then to the matter which is here for specific ruling today. That ruling is in fact a purely factual determination. It turns entirely upon fact and the ruling constitutes findings of fact.

We must be certain that we are applying the proper test as we answer the factual issue. These gentlemen have said to the Court that the factual issue really is whether or not the Brown children were excluded from attendance because of a sincerely held religious belief, meaning, I think, sincerely held by the leadership in the school, by the defendants.

Now, we must remember in that connection that we are not here considering a conscientious objector application where the Courts look to determining whether or not a particular applicant sincerely holds a religious belief, thereby causing him to be entitled to a conscientious objector status because that sincerely held religious belief is one which would exempt him from bearing arms.

We are here concerned with whether or not the leadership in the school, or the school itself, excluded the Brown children because of a generally held religious conviction, a generally held tenet of religion. In other words, we are not talking about whether one individual out there operating the school may have had some particular fundamental belief, or one person in the church had a particular fundamental religious belief, but whether there was a generally held, recognized, fundamental religious tenet of the school through its leadership.

As an example, as was discussed in the Wisconsin v. Yoder case. There they were dealing with whether or not the Amish had this generally held religious conviction that was being discussed in that case.

Now, with that brief comment, the Court accepts the issue as presented by the parties, that is, whether the Brown children were excluded because of a sincerely held religious belief, which if the Brown children had been accepted, their admission would have violated the free exercise of religion clause of the United States Constitution.

The answer to the factual issue is quite clear to this Court. It is taken from the candid and honestly stated words of Dr. Janney and of the deponents in the depositions that were presented to the Court, and from the documentary evidence in this case.

However, before I recite those facts which led the Court to the conclusion it has reached and will here announce, I want to make a couple of statements which I think are important to be made prior to the factual discussion that will follow.

The first is that the validity of what one believes cannot be questioned by the Court. Courts cannot reject religious beliefs because they consider the beliefs even to be incomprehensible, according to the language of Mr. Justice Douglas and the Supreme Court, and this is repeated throughout the cases. So, this Court is not at all, in the process of this ruling considering the validity of the belief professed, that belief having been professed as follows: That the comingling of the races is nonscriptual; that the

comingling of the races in a school would lead to intermarriage and that portions of the Old Testament and of St. Paul's letters, epistles to the churches suggest that comingling of the races is as expressed by the pastor nonscriptural.

The second thing that the Court should like to make clear is that because of the nature of this ruling, we shall not reach the issue of whether there is state interest of sufficient magnitude to override the interest of those claiming the protection of the free exercise clause of the Constitution of the United States, because the factual issue that shall be determined forecloses any consideration of that question.

Perhaps a statement by Mr. Kalapp summarizes the facts in this case. I give you this statement first because of its impact and then in the future findings of fact I shall discuss why Mr. Kalapp's statement was true and sound. In speaking of a policy against admission of blacks to the school and in answer to this question, "How was that policy adopted?" Mr. Kalapp responded, "I don't think it," that is the policy, "was adopted at a specific time as I recall it. I think it was something that evolved as a philosophy and a policy over a period of a number of meetings." Now that is a factual summary of this matter and that factual summary was made by Mr. Kalapp.

I point out here that when the Brown children received the note explaining that the school was sorry that its policy was one of non-integration, the school itself announced a policy, not a fundamental religious concept or belief.

I do not propose to be facetious in any way by making this statement, and I do recognize, this Court does recognize, that these defendants hold a sincere belief that their policy, their philosophy which evolved, was right, and that it, in fact, in their minds can be justified in the Scriptures, but a policy, a philosophy which evolves over the passage of time from 1961 until 1973 simply does not constitute that type of sincerely held religious belief, fundamental belief, which is protected by the free exercise of religion clause of the United States Constitution. I mention that I do not want to be facetious and I do not wish to be argumentative, but I do say to you that the Old Testament and the Acts of the Apostles and St. Paul's epistles have been around a long time. St. Paul lived and wrote in the first contury, by our calendar. So that it seems to me that a philosophy that evolves as social conditions change, as sincerely held as that philosophy may be, does not rise to that fundamental religious belief or practice which is protected by the free exercise of religion clause of the Constitution.

Now, not only did Mr. Kalapp quite honestly summarize the situation, but the principal of the school, on deposition, Mr. Kreft, answered the following question: "Who instructed you regarding the policy of non-integration?" His answer was, "The specifics of who instructed me? We didn't have a specific board meeting that I can recall. Basically it would be more or less the Board of Directors of the school who would direct me regarding the policy of enrollment."

Now we come to the factual matters that the Court has noted which clearly and abundantly bear out the summary that I have just given you as stated by Mr. Kalapp.

According to the testimony in this case the school was founded because those in executive capacity of the New Testament Baptist Church discussed the need for a Christian school as a fallout of the removal of the bible reading and so forth from the public schools. This discussion occurred somewhere in the early 60's because the literature says that the school was founded in 1961. It was incorporated in 1962.

Now, this Court can take and does take judicial notice that within this very district so-called school integration cases in the public schools were in progress. I know that the one in Palm Beach County was in progress because I ended up with it many years later and I am sure it was started in 1956. But this school was founded because of the need that was felt by the executive people there, and I use the term that was used in the answer, those of us in executive capacity, (I assume the gentleman was speaking of those in the church.) a need for a school as a fallout of the removal of bible reading and so forth in the public schools, not because of some fundamental religious belief about comingling of the races, and when the Articles of Incorporation were drafted and accepted, they contained an article, namely Article Three, which reads in part as follows:

> "The membership of this corporation," not referring now to students, "shall consist of any and all competent persons of good moral character who sympathize with and in good faith wish to participate in the purposes and objects herein expressed."

No reference there to any fundamental religious tenet or conviction reference comingling.

Mr. Verle S. Ackerman was associated with the school for about the first five years of its existence. He had not been associated with it for about six years immediately prior to the taking of his deposition. Mr. Ackerman was one of the first officers of the corporation. He was the secretary-treasurer. He states that he knows of no resolutions that were ever adopted by the Board alluding to the fact that no blacks would be admitted to the school. He was there for the first five years. When he was asked if up to the time he left there was any policy that had evolved concerning enrollment of black students he answered, "Not to my knowledge," and this is of considerable importance, "The issues in the first five years were not very strong issues in those days, because even in our public schools, the integration was just very token, and just beginning at that time." He said there were no directives issued prohibiting blacks from enrolling, "because it had never arisen. We never faced that," again indicating, as expressed by Mr. Kalapp, that the policy evolved as the issue arose, as the Board or leadership began to concern itself with whether or not black children might apply.

Mr. Kalapp, who was one of the incorporating officers, stated on his deposition that the policy, I underline his language, "came into being on a very gradual basis, because in the very early days of the school there was no such

conversation in regard to integration." At some point later the school, he said, "decided that a school philosophy needed to be adopted in view of the fact that it had gotten to be such a topic of conversation, . . because of all the furor in the newspapers and other news media that was being brought about by such things as busing and forced integration in schools." Hence the evolution of what he refers to as the philosophy and the policy that developed over a number of meetings.

The principal, when asked, "Is there a requirement that students have to be of the Caucasian race?" he replied, "The only way I can refer to that would be to the particular point that there was a policy generally described to me as 'we should not have integration of the races,' so I generally knew there was going to be a position of the school." He said this in connection with his coming to the school as the principal. He said that this decision was made about the time he was moving to the school and when asked if he was aware of any biblical directive which forbade the comingling of blacks and whites, his answer was as follows:

> "If I interpret the biblical directives? Say policy or written statement, I would simply refer to the ballot in the minutes. I don't know of any other dictates, so-to-speak, written. It is my duty to follow the policy."

So, the principal quite candidly, quite properly, states that he knows of a ballot and he simply follows the policy given to him. The principal did not exclude, and I realize that he was not the particular individual present that particular

day, but he did not exclude these children because of a fundamental religious tenet. He was following policy. Now we find later that Dr. Kreft does not disagree with the policy and that he, as the other people have, has a very sincere belief that the policy is correct. He said that he was not aware of what Dr. Janney based the forbidding of the comingling of blacks and whites upon. He said that basically he got his directives from Dr. Janney. If it had to do with finances he would go one place and other places for other ones, but generally from the Board and Dr. Janney, of course. He said he wasn't aware of what the forbidding of comingling of blacks and whites was based upon. His answer was, "Just by general references. Now, I don't know of a specific position, other than policy directives."

If the reason for excluding the children grows to the position of a fundamental religious practice or belief protected by the free exercise clause of the United States Constitution, it certainly is a reasonable inference that the principal would have known it and would have adhered to it for that reason. He stated that if there were any written material published by the Church that would indicate danger from interracial marriages that he would know of it and that he did not know of any such written material. He didn't know whether there was any teaching about socialization leading to interracial marriage and he said, "All I know is that this was the philosophy adopted by the Board, that the philosophy would be that it would be contrary to God's precepts and teachings to comingle the races and that the policy was not distributed through any of the literature of the school."

Now, I mention that these people, in good faith, have concluded that their philosophy can be reconciled with certain passages in the Old Testament and certain writings of St. Paul, and that statement was made after the institution of this law suit and Dr. Kreft quite candidly and honestly stated what he knew to be the position of the leadership there.

Now we come to a discussion of some of the documentary evidence in the case, but before I do that, I want to make a further finding of fact on what I have just mentioned with reference to literature about intermarriage which fits in with what I am about to say about the application for admission to the Dade Christian School.

A basic, fundamental tenet, one that, as expressed in one place in Yoder, pervades the thinking, the way of life of a certain group, certainly is one which is discussed in the school, certainly is one upon which literature is written and available in the school. It is not at all unusual for a group of persons to have fundamental religious beliefs about intermarriage. We are really not talking here directly about intermarriage, but about having such a fundamental religious belief, which it is reasonable to infer would be discussed and written about in the school of that particular religious group.

Now, Exhibit eight includes an application for admission to the Dade Christian School. The face sheet sets forth nine specifics under the heading of "We Believe." Those beliefs would appear to the Court to be the basic religious beliefs, the fundamental religious beliefs, religious tenets of the Dade Christian School. Where, in the listing of those

things which "we believe" is there a tenth fundamental religious belief that there should be no comingling of the races? If a fundamental religious tenet exists, is believed, there is no reason why it would not be among those listed. It should be a belief of which one is proud and to which one adheres.

On the portion of the application for admission to be filled out by the student, the student is asked whether or not he will agree not to dance whatsoever, whether at home or school or elsewhere, which is undoubtedly a sincerely held belief. The student is asked whether he agrees not ever to be critical and not ever to even talk about narcotics, all of which the school has every right to ask. It seems to me that if those details are discussed with an applicant and those commitments extracted from an applicant, a fundamental religious belief regarding comingling and socialization among races must be a part of the application if it were, in fact, that type of religious tenet protected by the Constitution.

On July 17, 1963, a vote was taken. This is a year or two after the school was founded, regarding whether or not the Church would integrate or remain segregated. Approximately 165 people, according to the evidence presented to the Court, voted and all voted for segregation. The Church was founded, I believe, in 1954. The Bible was studied carefully, I am sure, under Dr. Janney's leadership. I can tell that from hearing him speak. The reading and study of the Bible is of vital importance to these people, as it should be. It simply does not follow that a vote must be taken as to what is a fundamental religious tenet. It either is or it isn't a fundamental religious tenet. Would it

be necessary to take a vote, for example, on the question of "Shall we continue to have prayer in our services?" That is a fundamental religious practice and no such vote would be necessary. Not only that, but this vote was presented on a ballot which contained other questions. I cannot tell from the record what all of them were, but I know one of them had to do with whether or not a youth camp should be retained or something about the future of a youth camp. Another seemed to have to do with a method of visitation or ministry and enlarging the congregation, and included with those questions was the question, "Should we have segregation or integration?" So, you can see that as the situation developed the people at the Church were formulating a position and a policy by vote, which is a very democratic way to do it. The Court is not complaining at all about that, nor about the policy or the philosophy of the church. The Church, however, in a deposition of Mr. Kreft, the principal of the school, said this is up to every individual member of the church. These people would not be required to answer a question of their particular belief in this matter.

A generally held, fundamental religious belief is one recognized by the group as a fundamental belief. Therefore, the vote and the statement that it is up to the individual belies the proposition that the defense is such factually as to be protected by the free exercies clause of the Constitution. There is no doubt that it is a sincerely held belief and the Court recognizes the sincerity, but their belief is not such as is protected by the free exercise clause of the United States Constitution because it is a philosophy, a policy, a sincere belief arrived at subjectively.

There were a few comments on those 165 ballots in reference to question number two, which bear out the evolution of this policy as discussed by Mr. Kalapp. One of the comments, as an example, was "Segregation is the only course of action." Another, "Segregation is wise." Another, "When you integrate, I separate." And perhaps the most interesting one, "I believe that the stand for integration we have taken is a wise decision." We have taken a position. We have taken a stand. We have formulated a policy in which we believe.

The principal, in speaking of the individuality of belief that I have referred to, when asked if there were approximately four thousand people who adhered to the belief, answered, "No, I would say that. I would just say that those that have responded would have to be counted, but they would not be required to answer a question of their particular belief in this matter."

When Mr. Kalapp was asked if the concept of no socialization between the races is a major theme of his religion, he answered, "Very minor." A very minor theme. He said that it is up to the individual's interpretation of the Bible.

The principal said that if a black student were to be enrolled that that would not destroy his exercise of religion, but that it would erode his religious liberties. The principal said that it was intermarriage that his belief prohibited and to admit black students would give rise to a specific potential of interracial marriage because to admit the Brown children would set a precedent. Mr. Kalapp also said, when asked if blacks were to be enrolled

would it endanger his religious beliefs, "If it culminated in an intermarriage situation between the races."

All of these answers show that there was concern particularly about interracial marriage. One can have a fundamental religious precept about interracial marriage and teach it, but we are talking about admission of a black student to a school. The concern is, according to the depositions, that that could very well lead to intermarriage in the future, because we expect them to be young when they come here and many of them go through the twelfth grade.

I really think that the closer precept to that which would be protected by the Constitution is one which these people express with regularity, a fundamental precept against intermarriage and the concern is a social concern, a practical concern, and a sincerely held philosophy, but not one of their nine beliefs.

This suit was filed August 6, 1973. It was served on August 9, 1973. An answer was filed on August 27, 1973. Apparently the leadership had not had an opportunity to communicate to its excellent lawyer the fact that admitting blacks would violate the free exercise of their religion, because it was September 2nd, 1973 when that position was first expressed in this litigation.

The record does not tell us when Dr. Janney delivered his message which is taped and in evidence here, but it does tell us that on August 1, 1973, five days before the

suit was filed and after the application of the Brown children, the church clerk entered the following minutes of the business meeting of the church:

> "Dr. Janey explained to the congregation the decisions that had been made by the church in previous years in regard to integration. He also explained that he would follow the previous dictates of the church in this area unless instructed otherwise by the membership."

I commend Dr. Janney for looking to the congregation. That is not the point. Dr. Janney sounds to me like a man of such sincerity in his beliefs that he would not abandon a sincerely held fundamental religious precept because the majority directed him to do otherwise. That simply, in the language of Dr. Janney, as recorded in these minutes, demonstrates policy position, philosophy, not fundamental religious beliefs.

There are three pamphlets in evidence. They are exhibits one, two and three. I don't know who introduced them, or why, but I expect that it was to show that there were in fact writings and addresses on religious matters, including the question of "Segregation or Integration, What saith the Scripture?" Exhibit One is an address by Dr. Bob Jones, Sr., in 1960, entitled "Is Segregation Scriptural?" Exhibit Two is a discussion of "Segregation or Integration, Which?", a sermon by the pastor of the Dayton Baptist Temple, Gerald O. Fleming, in Dayton, Ohio, in 1956, shortly after the first case on school integration, a 1954 case. Exhibit Three, "Segregation or Integration. What saith the Scripture?" by Peter S. Rutland, the presi-

dent of the Pensacola Bible Institute, first edition, 1962, second edition, 1969.

There is no showing in the record that these pamphlets were ever distributed to the congregation or to the leadership, but it is at least apparent to me that Dr. Janney utilized these publications in the preparation of his sermon or discussion that was delivered following the filing of the current lawsuit. I mention that simply to say that Dr. Janney apparently had them available to him, but there is no showing that there was any distribution of them to the membership.

One of the deponents said, "Well, we had some pamphlets of some kind that were available, but I never knew of any distribution of any such fundamental religious belief." Dr. Janney, himself, answered the question for the Court, in a sense, when, after the filing of the lawsuit, he stated as follows to his congregation, speaking of the lawsuit, "Our position on this matter then is that there are biblical reasons for having separate facilities," which he, and I expect most members of his congregation, accept. "There are practical reasons. It doesn't work. There are social reasons. It leads to interracial marriage and I think that intermarriage is a very bad circumstance. It is unscriptural." Dr. Janney announced the position that would be taken in the matter. They formulated a philosophy, a policy, which they feel can be supported, can be reconciled with the Scriptures, but their philosophy still remains a philosophy as distinguished from that type of fundamental religious belief which is protected by the free exercise clause.

Just as a further fact, going to the evolution of this policy and philosophy, Dr. Janney, in his address given after the lawsuit was filed, referred to his participation in the activities of a youth camp. I don't know whether it was the church's youth camp or not. In making one of the several points he made, he talked about an underprivileged camp that he was participating in in some capacity. There were about 500 blacks and three whites at the camp and he stated that was the ratio of the underprivileged in that particular area. Now apparently, at that time at least, socialization was acceptable, albeit there were three whites and five hundred blacks, the reverse ratio as would have been in attendance at the school. We recognize that the philosophy of the school is based in part upon the fact that the children would likely be in the school for twelve years together and the camp is just a temporary thing and intermarriage, through socialization, though it might occur, was not as likely to occur in a short period as over a period of comingling for twelve years.

The only reason I mention that is that this is further evidence of the clear picture that this belief is a sincere belief and philosophy, but were it a fundamental religious belief and tenet, then it was not practiced at that camp. I mention that only as bearing upon the distinction between a philosophy and a fundamental religious practice.

The Yoder case talked about the sincerity of Henry Thoreau and his activities at Walden were based upon his philosophy subjectively formed. This leadership in this school has a philosophy and a policy which it believes in, subjectively arrived at as a result of the subjective evaluations of the social scene and political scene, but the ad-

mittance of these children would not endanger the free exercise of religion. As stated by one of the persons, it is a very minor consideration.

Therefore, all of the evidence in this case dictates the opinion and the ruling that the defense, based on the free exercise of religion clause, cannot be upheld because the position taken, which has evolved, does not rise to one of the fundamental religious tenets of the school or the church.

Dr. Janney closed his remarks with an observation that he believed that twenty years from now the school would be in the same position that it is now with reference to this question, and I don't doubt that he is right because this point of law has a long way to go to be ultimately decided in the Supreme Court of the United States and the decision is one that we cannot anticipate. This Court has followed the law and is absolutely satisfied from this record that its factual determination is correct.

DONE and ORDERED at Miami, Southern District of Florida, the 28th day of May, 1975.

/s/ Joe Eaton
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 73-1313-Civ-JE

JOHNNY BROWN, JR., etc., et al.,
Plaintiffs,

vs.

DADE CHRISTIAN SCHOOLS, INC., etc., et al.,
Defendants.

(Filed June 27, 1975)

FINAL JUDGMENT AND INJUNCTION

THIS CAUSE came on for trial before the Court without a jury on the issue of damages, liability having heretofore been determined by the Court. The issues in this cause having been duly heard and a decision having been duly rendered, it is

ORDERED and ADJUDGED that:

1. Plaintiff, Marice Brown, shall recover from Defendant, Dade Christian Schools, Inc., the sum of $2,000.00 with lawful interest of 6% beginning the date of this judgment.

2. Plaintiff, Johnny Brown, Jr., shall recover from

Defendant, Dade Christian Schools, Inc., the sum of $1,500.00 with lawful interest of 6% beginning the date of this judgment.

3. Plaintiff, Valerie Michelle Brown, shall recover from Defendant, Dade Christian Schools, Inc., the sum of $1,000.00 with lawful interest of 6% beginning the date of this judgment.

4. Plaintiff, Jacqueline Marie Brown, shall recover from Defendant, Dade Christian Schools, Inc., the sum of $1,000.00 with lawful interest of 6% beginning the date of this judgment.

5. Plaintiffs shall recover from Defendant, Dade Christian Schools, Inc., reasonable costs of this action.

It is further

ORDERED and ADJUDGED that Plaintiffs take nothing from the individually named defendants, and the Plaintiffs claim for damages is dismissed as to the individually named defendants.

It is further

ORDERED and ADJUDGED that Defendants, Dade Christian Schools, Inc., Arthur E. Kreft, and A. C. Janey, their agents, servants, employees and all persons acting in privity with them are permanently enjoined and restrained from barring Valerie Michelle Brown and Jacqueline Marie Brown from enrolling in the Dade Christian Schools, Inc.,

because of their race. Plaintiffs' prayer for injunctive relief is dismissed as to Defendants John M. Kalapp and V. S. Ackerman.

DONE and ORDERED at Miami, Southern District of Florida this 27 day of June, 1975.

/s/ Joe Eaton
United States District Judge

cc: Ellis S. Rubin, Esq.
Shutts & Bowen

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 73-1313-Civ-JE

JOHNNY BROWN, JR., etc., et al.,
Plaintiffs,

vs.

DADE CHRISTIAN SCHOOLS, INC., etc., et al.,
Defendants.

(Filed June 27, 1975)

SUPPLEMENTAL FINDINGS AND CONCLUSIONS

On May 28th, 1975, this Court orally announced findings of fact and conclusions of law on the liability phase of this case. Thereafter a conference was held prior to consideration of the damages issue. Counsel for the plaintiffs announced at the conference that Plaintiffs' prayer for punitive damages and for an award of attorneys fees were withdrawn. The parties agreed to submit written memoranda on the issue of compensatory damages and to await the Court's judgmen: on that issue.

Upon consideration of the record and the memoranda filed, the Court enters the following findings of fact and conclusions of law.

1. The refusal of the Defendant, Dade Christian Schools, Inc., a Florida non-profit corporation, to accept the minor plaintiffs as students solely because the minor plaintiffs are black, proximately caused each of the named plaintiffs to be damaged.

2. Each of the named Plaintiffs have suffered embarrassment, humiliation and mental anguish as a proximate result of such conduct.

3. An award of compensatory damages for such embarrassment, humiliation and mental anguish is hereby made as follows:

A. In favor of Marice Brown, and against Dade Christian Schools, Inc.,[1] the sum of $2,000.00.

B. In favor of Johnny Brown, Jr., and against Dade Christian Schools, Inc.,[1] the sum of $1,500.00.

C. In favor of Valerie Michelle Brown and against Dade Christian Schools, Inc.,[1] the sum of $1,000.00.

D. In favor of Jacqueline Marie Brown, and against Dade Christian Schools, Inc.,[1] the sum of $1,000.00.

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[1]In the pretrial stipulation filed February 19, 1974, the parties agreed in paragraph IX, page 6, that the issue of law to be determined in the cause was "Are Plaintiffs entitled to relief . . . by reason of the refusal of defendant Dade Christian Schools, Inc., to accept the minor plaintiffs as students solely because of their membership in the black race?"

4. There is no basis in the record for finding the individually named defendants liable for the payment of compensatory damages to plaintiffs.

5. Plaintiffs are entitled to a permanent injunction restraining the defendants, Dade Christian Schools, Inc., Arthur E. Kreft, and A. C. Janey, their agents, servants, employees and all persons acting in privity with them from barring Valerie Michelle Brown and Jacqueline Marie Brown from enrollment in the Dade Christian Schools, Inc., because they are black.

DONE and ORDERED at Miami, Southern District of Florida, this 27th day of June, 1975.

/s/ Joe Eaton
United States District Judge

cc: Ellis S. Rubin, Esq.
Shutts & Bowen

Supreme Court, U. S.
FILED
FEB 23 1976
MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

**Nos. 75-62, 75-66,
75-278 and
75-306**

RUSSELL L. RUNYON, et al.,
Petitioners,

vs.

MICHAEL C. McCRARY, etc., et al.,
Respondents.

MOTION OF DADE CHRISTIAN SCHOOLS, INC., FOR LEAVE TO PRESENT ORAL ARGUMENT

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75-278 and
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Respondents.

MOTION OF DADE CHRISTIAN SCHOOLS, INC., FOR LEAVE TO PRESENT ORAL ARGUMENT

Pursuant to Rule 44.7 of the Rules of this Court, DADE CHRISTIAN SCHOOLS, INC., respectfully moves for special leave of Court permitting its undersigned attorney to present an oral argument in the above referenced matters on the side of the defendants. In support of this motion, DADE CHRISTIAN SCHOOLS, INC., would show the Court the following:

1. On December 11, 1975, DADE CHRISTIAN SCHOOLS, INC., (DADE CHRISTIAN) moved the Court for leave to file a brief in these matters as *amicus curiae*. That motion was granted on January 12, 1976, and DADE CHRISTIAN's brief was filed on January 21, 1976.

2. Like the defendants in the above referenced matters, DADE CHRISTIAN has been sued under 42 U.S.C. §1981 by members of the black race because of its racially discriminatory admissions policy. Unlike the defendants in the pending cases, however, DADE CHRISTIAN has never denied that it utilized race as an admissions criteria and DADE CHRISTIAN has consistently justified its racially discriminatory admissions policy on religious grounds. In addition, unlike the pending actions, suit was instituted against DADE CHRISTIAN within two weeks of the racially motivated exclusion of members of the black race from the school's student body.

3. DADE CHRISTIAN has filed the only brief as *amicus curiae* in these matters on the side of the defendants, while several such briefs have been filed on the side of the plaintiffs.

4. Among the participants in these cases, DADE CHRISTIAN stands as the sole representative of thousands of parents and students throughout the United States who support racially segregated private schools operated under the auspices of religious organizations. In a proceeding as sensitive as this one, surely this sector of American society should be fully heard by this Court.

For the foregoing reasons, DADE CHRISTIAN respectfully asks that this motion be granted.

Respectfully submitted,

SHUTTS & BOWEN
Attorneys for
Dade Christian Schools, Inc.
Tenth Floor
First National Bank Building
Miami, Florida 33131

By /s/ Lawrence R. Metsch
LAWRENCE R. METSCH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing motion were mailed this 20 day of February, 1976, to the following:

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/s/ Lawrence R. Metsch

LAWRENCE R. METSCH